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ELECTION CASES.

REPORTS OF DECISIONS

UNDER THE

DOMINION AND ONTARIO CONTROVERTED ELECTION ACTS

RELATING TO THE ELECTION OF MEMBERS FROM THE
PROVINCE OF ONTARIO TO THE HOUSE OF COMMONS
OF CANADA AND TO THE LEGISLATIVE
ASSEMBLY OF ONTARIO.

1884-1891.

WITH A TABLE OF THE NAMES OF CASES REPORTED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

REPORTED UNDER THE AUTHORITY OF
THE LAW SOCIETY OF UPPER CANADA.

VOLUME I.

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ROWSELL & HUTCHISON.

1891.

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ERRATA.

- West Northumberland Case—p. 32, line 13, for “B.” substitute “H.”
- West Simcoe Case—p. 129, line 21, for “necessary” read “unnecessary.”
- Muskoka Case—p. 199, last line of head note, for “voluntary” read “involuntary.”
- East Simcoe Case—p. 293, line 12, before “working” insert “not.”
- Welland Case—p. 384, line 8 from end of head-note, before “the” insert “and.”
- Lincoln Case—p. 428, line 12 and line 17 of head-note, for “respondent” read “petitioner.”
- East Elgin Case—p. 475, line 9 of head-note, for “R. S. O.” read “R. S. C.”
- Hamilton Case—p. 500, line 9 from top of page, strike out “the” before “money,” and insert “was” after “money.”
- Hamilton Case—p. 500, line 14 from end of head-note, after “that” insert “as to.”

REPORTS OF ELECTION CASES.

NORTH ONTARIO.

PROVINCIAL ELECTION.

BEFORE MR. JUSTICE BURTON AND MR. JUSTICE OSLER.

UXBRIDGE, *January 3, 4, 5, 29, and 30, 1884.*

THOMAS TRELEAVEN, *Petitioner*, v. ISAAC JAMES GOULD,
Respondent.

*Pleading—Bribery—Treating—Agency—Promises—Valuable present—
Association meeting—R. S. O. ch. 10, sec. 159.*

An allegation in the petition “that the respondent was by himself, &c., guilty of corrupt practices, as defined by the Controverted Elections Act of Ontario,” sufficiently charges the commission of corrupt practices under secs. 152 and 153 of “The Election Act,” R. S. O. ch. 10.

The respondent, during his canvass and on the same evening that a public meeting was held for the purpose of promoting the election, treated a number of persons, many of whom were voters, collected in a bar-room. It was shewn that it was not the respondent's general habit to treat, that all present were invited to drink, and that he had not treated more than twice or perhaps three times during the canvass.

Held, not a corrupt practice, and that in view of the ordinary custom of treating in the country, it might be regarded more as an expression of good feeling to those who were supporting him.

P., an agent of the respondent, on the morning of the election called on the wife of one K. and asked her to use her influence with her husband to induce him to vote for the respondent, saying, “I will make it all right.” She told her husband, who laughed and replied that he intended to vote for the respondent any way, or that he would do as he liked, and he did vote. After the election the wife called at P.'s store and having reminded him of his promise, she went into the grocery department and got goods to the value of \$4.49. Subsequently an account was rendered including this \$4.49, and her husband objected to pay it. She then told a clerk of P.'s that that part of the account was “settled off election time,” and a new account was subsequently rendered by the attorney for the estate, as P. had failed in the meantime, with that item omitted.

Per BURTON, J. A.—The words of the promise in themselves alone did not amount to “an offer or promise of money or other valuable consideration,” but being followed *after* the election by the present of goods, the gift was made in pursuance of the promise, and therefore corruptly; but that as P.’s agency had terminated with the election, it was not such a corrupt practice as to affect the candidate unless done with his privity and assent.

Per OSLER, J. A.—P. intended to convey and did convey to the wife the idea that if she procured or would induce her husband to vote as he wished, she would receive *something of value*, the giving of the groceries after the election was an act of bribery, and if it stood alone it would have been necessary to carry the evidence of agency further, but following the promise it showed what both parties understood, and to that extent the respondent was affected by what was done after the election.

Held, also, under all the circumstances, that this being the single corrupt act proved the case was a proper one for the application of sec. 159, though the majority was only twenty, and the election should not be avoided.

The appointment of a voter as an agent so as to allow him to vote in a division other than his own, and near where he was employed, is not a corrupt practice.

A payment of \$10 was made to P. H. to go some miles for voters, although another messenger was sent and paid by another agent for the same purpose, who failed to get through on account of the roads, and returned the money.

Held, that there was no reason to suppose that the money was paid colourably.

S., an agent of the respondent, with his own conveyance brought a voter from N. to his own house, where he remained as a guest until after the polling day.

Held, not within either secs. 153 or 154 of the Act.

An association formed “for the greater diffusion of liberal principles and the social and intellectual improvement of its members,” being prevented by an accident from meeting at the Town Hall, held a meeting in a tavern, and was treated by the respondent.

Held, not a meeting of electors within sec. 151 of the Act.

On the morning of the polling day, S. met McN. in a hotel, and asked him to vote for the respondent, to which he agreed, he then took him to his (S.’s) house, and afterwards to a tavern where he treated him, and then to the poll where he voted. S. was a man who always took an active part in every election on the Reform side, and during this election he had, on one occasion, attended a meeting of the local political organization, or committee for whose acts in the management of the election the respondent would be answerable, when some election work was done; but it was not shewn that he had canvassed except in this particular case, or that he was a member of the committee, and he swore that he was not asked to do any work. On the polling day he was actively engaged in driving voters to the polls in his own conveyance, which he said he did as a mere volunteer.

Held, that the treating was a corrupt act, but that S.’s agency was not proved.

The suggestion of names and recommendation of Deputy Returning Officers by political associations commented on and disapproved of.

THE petition contained the usual charges of corrupt practices; and there was a cross petition filed, in which Jacob Shaver Kimmerly was the petitioner, but which was abandoned, no evidence being taken in support of it, and was dismissed, with costs.

McCarthy, Q. C., (with him *N. F. Paterson, Q. C., J. A. McGillivray*, and *F. Madill*.) for the petitioner.

MacLennan, Q. C., and *Wm. Johnston* for the respondent.

February 18, 1884. BURTON, J. A.—The particulars annexed to the petition contain 108 charges, in addition to some that were allowed to be added at the trial.

Of these 108, 31 were personal charges against the respondent, 77 against agents, 88 were abandoned or disposed of at the hearing; leaving yet to be considered 20, of which 11 are personal charges, and 9 of corrupt practices by agents.

The first seven charges are charges of corrupt treating by the respondent under sec. 152, R. S. O. ch. 10. They are denied by the respondent, but it is contended that the weight of evidence is in favour of the charges, and that they should be considered in connection with charge 20, a payment to one John Adams of a sum of \$10, with the intent that it or some part of it should be expended in treating, and the fact of treating by Adams, which is not disputed. Assuming that in the face of the denial it is proper to entertain the charges at all, it was very strongly urged by the counsel for the petitioner that as it was shewn that it was not the practice of the respondent to treat to any great extent on other than election times, it must be assumed that it was done with the view to affect the election, and to induce voters to give him their support or to refrain from voting.

I must confess that I do not attach much weight to that contention, even if it had been shewn that the respondent abstained from treating generally to a much greater extent than has been shewn here, and that treating during the election had been brought home to him much more

clearly and extensively than has been done during this trial.

I can understand that, as in the cases referred to, the treating might be of that profuse and general nature as to render it necessary to show that it was the ordinary practice of the party at all times, and thereby to negative the presumption which such profuse treating might raise, that it was done corruptly with a view to influencing the election; but that is very different from a case in which it was shewn that the candidate was not an habitual treater.

It might be that the practice was very distasteful to him, and that his visits to a bar room on other occasions would be confined to those when he was settling his hotel bill or giving directions as to the care of his horses, or other pure matters of business. It would be strange indeed if, under such circumstances, he were in cold blood to invite up to the bar every man, stranger though he might be, who happened then to be in the bar room; and yet, when going into a bar room pending an election, receiving the welcome of his friends, and amid the general excitement incident to such an occasion, he might hesitate, in view of the universal custom of the country, to render himself singular, and in the opinion of many churlish, in standing aloof and refusing to treat, and might therefore conform to this general custom without the slightest corrupt intention.

Urgent appeals have been made to us during these election trials, as if we were sitting here as *censores morum*, under an obligation to enforce a temperance code which has no existence except in the imagination of the parties. The Legislature has not said there shall be no drinking or treating during elections. What they have said is that no candidate shall corruptly give any drink to any person in order to be elected, or for the purpose of corruptly influencing any person to give his vote or refrain from voting at such election. This raises a question of fact, not whether there has been the giving of drink, but whether

it was done corruptly with either of the intents mentioned in the statute.

It is impossible, in my opinion, to hold upon this evidence that the treating, if proved, would have amounted to a corrupt treating within the meaning of the statute. I am convinced that the treats in question, if the witnesses are not mistaken in saying that they were given by the respondent, were, according to their evidence, given in the common course of things, as following a common custom; and I cannot bring myself to hold that they were given corruptly.

I do not see any such discrepancy in the evidence of the respondent and Adams as to lead to the inference that the money was given for any other purpose than is deposed to by Adams. I think, therefore, that the whole of these charges fail.

Charge No. 108.—In this case we are bound to credit the version of the transaction given by Mrs. Kyle. According to her statement John H. Patterson an agent of the candidate, called upon her at her own house in reference to her husband's vote, and asked her to use her influence with him, adding "he would make it all right." This was on the morning of the polling day. Some few days after the election she went to Patterson's store, and put him in mind of what he had said, although she does not remember his answer, but after seeing him she went into the grocery department and got goods to the value of \$4.49, which she says she thought was enough. She says she mentioned what Patterson had said to her husband, who laughed and said he intended to vote for Gould anyway.

That upon the account coming in some time afterwards, including this item of \$4.49, her husband objected to pay it, and she says that she told a clerk of Patterson's that that part of the account was, as she expressed it, "Settled off election time," and a new account was subsequently rendered by the attorney for the estate, Patterson having in the meantime failed, with this item omitted.

Kyle appears to have been in very impecunious circumstances, having been shortly before burned out, and Patterson on that occasion made him a present of some goods.

Patterson when called denied that he had ever promised Mrs. Kyle anything to induce the husband to vote, but all he would say about the remark attributed to him by Mrs. Kyle was that he did not remember saying so. He does not deny her calling at the store subsequently, but says he does not remember it, and says that he had nothing to do with the office or the books; but he admitted that although he had heard the particulars of this charge he had never been down to make enquiries as to the way in which the new account came to be rendered, leaving out this item: and he denied all knowledge of the alteration in the account, and denied having given any directions to any one in the establishment to give her goods after the election.

Under these circumstances we are bound, I think, to accept Mrs. Kyle's version, and we are called upon to say whether the words attributed to Patterson are sufficient to bring this case within subsec. *a* of sec. 149, R. S. O. ch. 10, as "an offer, or promise, of money or valuable consideration."

I did not understand Mr. McCarthy to contend that they would, apart from the light thrown upon them by the alleged act of Patterson after his agency had ceased; but he urged that the two were so connected as in effect to continue the agency till after the election. My own view is, that the words used are by themselves altogether too indefinite to warrant our holding them to amount to such a promise, and that as regards the candidate they cannot have the effect contended for.

A similar question was discussed in the *Halton Case*, Hodgins's E. C. 283, where there was a distinct promise that if the woman would use her influence with her husband the party seeking such influence would make her a "nice present." The doubt there was, although there was an offer of a nice present, whether there was anything named from which the Court could see that it was a promise of any thing of any appreciable value; but it was a promise of a

present of some kind, and the addition of the word "nice" served to indicate that it should be a present worthy of her acceptance. The Court thought it did not lie in the briber's mouth to say that he intended a present of no value, and although not without some hesitation came to the conclusion that, although not allowed to construe the statute according to considerations of supposed policy, they might well hold the words then used to apply to such a promise as came within the terms of the statute.

All the cases I have been able to find are cases in which, although no distinct sum in money has been promised or offered, there has been something offered which was estimable in money as a valuable consideration.

For instance, in *Simpson v. Yeend*, L. R. 4 Q. B. 628, the promise was: "I said, he would be remunerated for what loss of time might occur." So a promise shortly before the election to allow voters to shoot rabbits: *Lawnceston Case*, 2 O'M. & H. 129.

But whilst agreeing with the remarks made by some of the Judges in the reported cases as to the importance of not raising subtle distinctions or refinements as to the precise words in which the promise or offer is conveyed, I must be satisfied that it comes plainly within the meaning of the words used, as well as within the spirit and scope of the enactment. Can I say that the words here used, (and I am at present dealing with the words alone,) amount to an offer or promise of money, or other valuable consideration? To my mind they do not. There may have been a hundred ways of which we know nothing in which Patterson may have had it in his power to make it all right with this woman, and yet not come within the meaning of the Act of Parliament against this particular offence.

When we find the same person, shortly after the election, making a present of goods to her after being reminded of the promise, we may fairly infer that the gift was made in pursuance of promise, and therefore corruptly. Such a transaction comes within the provisions of the Act, but we give full effect to the Act when we hold the briber liable

to the penalty provided and the vote of the party bribed void upon a scrutiny; but we should scarcely be warranted in assuming that it was the policy of the Act to make one person liable for the acts of another who was not his agent when doing the act complained of, and to declare it a corrupt practice so as to affect the candidate.

The agency of Patterson terminated with the election, and any act done subsequently, so as to affect the candidate, must, in my opinion, be shown to have been done with his privity or assent, either express or implied. Take this case: a promise is made by a candidate which might be susceptible of different meanings, one perfectly innocent, the other which would show a corrupt promise within the meaning of the statute. It could scarcely be seriously contended that admissions made by the agent, subsequent to the election, would be admissible in evidence against the candidate of the meaning of the promise.

We were referred by Mr. McCarthy to Mr. *Cunningham's* work on Elections, 2nd ed., at p.308, but I am not prepared to accept the proposition there laid down, and the illustration given by him as sound law. He goes the length of saying that it would be preposterous to say that the admissions of an ex-agent after the election, as to something done during the election, would not be binding on the principal, and then he takes this illustration—an action against a person for an injury caused by the negligence of his servant. We will suppose, he says, “that the servant before the trial of the action leaves the employer’s service, and after that makes an admission that he was at fault in the matter which has given rise to the action: “is it to be contended,” he proceeds, “that this admission would be inadmissible against his employer?”

I do not know that the circumstance of his having left his employer’s service would be a factor in the enquiry, but with great deference to a writer whose work is so frequently referred to as authority, I think I should have very little hesitation in holding, that an admission by the servant subsequent to the accident would not be receivable in evidence against his employer.

Mr. Justice Keogh's remarks in the *Galway Case*, 2 O'M. & H. 49 are relied on by Mr. Cunningham, but that learned Judge's proposition that if agency were established the agent's declaration afterwards referring to anything which took place at the elections is too broadly stated.

Mr. Taylor draws the distinction very clearly between admissions by the principal and those by an agent.

The first, whenever made, may be given in evidence against him, but the admission of the agent binds only when it is made during the continuance of the agency in regard to a transaction then depending "*et dum fervet opus.*" When the agent's right to interfere in the particular matter has ceased, the principal can no longer be affected by his declarations any more than by his acts, and they will be rejected as mere hearsay.

And in the case put of the servant's negligence the words uttered at the time of the occurrence would be admissible as determining or tending to determine the nature of the act; but whether he still continued in the service or had been discharged, his statements made at any time subsequently to the occurrence are manifestly not receivable. Any fact material to shew the negligence would, in order to bind his master, have to be proved by his testimony and not by his mere assertion.

I am glad to find that this was the view taken by the late learned C. J. Draper in the *West Peterborough Case*, Hodgins's E. C. 275, where he refused to receive evidence of a conversation with an ex-agent after the election, Even if he asserted some fact of importance bearing on the issue his statement of that fact, he held, would not be evidence to charge the respondent.

Willes, J., held in the same way, in the *Bodmin Case*, 1 O'M. & H. 118, "A man is bound, he says, by the admissions of his attorney made in the course of the cause, but not by a statement of the attorney when he goes to examine a witness, who has been summoned by the other side, for the purpose of knowing what that witness is about to say. That is not an admission made in the cause.

It is a mere statement of his attorney. Evidence of that kind is very much subject to be misrepresented, and has never been admitted in cases, except through want of care at the time."

I have no doubt that upon this evidence, and assuming the facts to be as sworn to by Mrs. Kyle, as I think we are bound to do, there was bribery on the part of Patterson, but I do not think that it can have relation back so as to affect the candidate. The remark attributed to him was not an agreement, or promise of money, or valuable consideration within sub-sec. *a.* of sec. 149, and I agree in the contention that the subsequent corrupt act of Patterson cannot be relied on as giving life and vitality to something which had no value or effect before.

Mr. Justice Willes, in the *Southampton Case*, 1 O'M. & H. 223, uses this language: "My impression is, that what is done after the election can only be material as throwing light upon some transaction before the election, and so leading to the supposition, that there was before the election some breach of section 5 of the Corrupt Practice Act of 1854."

Under the English Act 17 & 18 Vic. ch. 102 s. 4, it is provided in express terms, that treating, if done after the election, shall be just the same as if done before, yet it has always been held that when given after the election it must be given by the candidate or by somebody who still continues to be connected with the candidate: that the agency of a person employed to canvass expires with the election, and unless there was some evidence to show a continuing authority the election could not be avoided by the act of a person who had filled that position. See remarks of Blackburn, J., in the *North Norfolk Case*, 1 O'M. & H. 243.

The giving the goods without payment after the election, though given in consequence of Kyle having voted, would not expose Patterson to penalties unless shewn to have been done in pursuance of a previous corrupt agreement; but the gift, coupled with the remark made to Mrs.

Kyle, leads to the almost irresistible conclusion, that the act was done corruptly by Patterson on account of Kyle having voted at the election; but it is in my judgment a fallacy to say that the giving of the goods can, as regards the candidate, be regarded, as was urged upon us, as a continuation of the authority beyond the termination of the election. It may or may not have been in the contemplation of the agent to make it all right with Mrs. Kyle by the delivery of goods; as against him we must assume that it was; but if the act as it stood at the termination of the election was not a corrupt practice it cannot as regards the candidate become so, in my opinion, by an act of Patterson after he had ceased to be an agent, although I am free to say that I have some doubt as to the correctness of my conclusion in consequence of the different view of the matter taken by my learned brother.

A charge against the same Mr. Patterson was argued at the same time. The charge is, that Patterson promised to pay and paid a sum of money to one Powell to vote, or refrain from voting. Patterson so far agrees with Powell that he admits the payment of twenty-five cents, but only one sum of twenty-five cents, out of which Powell desired to pay fifteen cents to a man who was working with him, and that he told him, as he had frequently done before, that he could take the money, ten cents, for a drink. Powell also said that Patterson offered to lend him his horse and buggy, so as to leave the village and not vote. This is denied by Patterson. Powell's evidence was given in a very unsatisfactory manner. In point of fact he did not avail himself of the offer, if made, and voted. It would be most unfair to find the charge proved on this evidence.

We come next to charge 14, which is one of treating a meeting of electors assembled for the purpose of promoting the election.

I have come to the conclusion that there was no meeting of electors within the meaning of the statute in this case. The difficulty has been caused chiefly by the respondent

and the witness Thompson. The former was undoubtedly advised by Card and Haley, that there was to be a meeting of a committee on that evening, and he appears to have considered that they were actually sitting when he arrived at the tavern; but that might well be, with the previous information he had received.

In point of fact, an association was formed in November, 1882, when some of the inhabitants met together, and discussed the advisability "of having a live, practical association, which would have for its object the greater diffusion of liberal principles, and the social and intellectual improvement of its members."

It does not appear to have taken very deep root, or to have flourished very vigourously, for although they were to meet monthly, the only three occasions when they met subsequently were in December, when they adopted a constitution, and selected a subject for debate at the ensuing meeting, viz., the question of "The Ballot or Open Voting;" but the debate did not come off in January, as some of the persons selected to conduct it did not put in an appearance; and at the usual monthly meeting in February (the meeting now in question), as the township clerk had accidentally or designedly taken away the key of the town hall, where the meeting was to have been held, the parties not being able to get access to the hall, went to Mrs. McVeigh's tavern, and it is contended that the meeting was held there, but several witnesses swore, and I think everything tends to confirm their evidence that no meeting took place at all; and it would be immaterial if it did, if it was really a meeting of the members of the association for the purpose of having the debate and conducting the ordinary business of the society.

But it was contended that even if the association was originally formed for the purposes I have indicated, they had overstepped the bounds originally prescribed, and had, in fact, become a body for promoting the election of the candidate; and this view received some countenance from the evidence of a Mr. Thompson, whom Mr. McCarthy

complimented on his obtuseness, who did speak of this being the association "which did all the Reform work in Mara, and through which the election committees were appointed." Several respectable and intelligent witnesses were called who denied this, and there is nothing in the minutes or proceedings of the association to show that they ever interfered in election matters. Even if this had been shown it would not, in my judgment, affect the question we are now considering, as this was shown to be the ordinary monthly meeting, and the only business contemplated was the discussion of the ballot, &c. The charge, therefore, in my opinion, fails.

Two other charges which were allowed to be added, consisted of the payment by the respondent of two sums of \$5 each to a man named McPhail and another, who were teamsters in the employ of the respondent, and who were sent by him with his teams to bring out voters. The money was sworn to be paid to them to pay their expenses, and was duly accounted for by them to the respondent, and one dollar returned by one of them.

It is alleged that one of these was a voter, and as he would be unable to vote at his usual polling place, the expedient was resorted to of appointing him an agent at another polling place near to the place to which he was directed to drive, and with a certificate from the returning officer so as to enable him to vote at the place where he was deputed to act as agent.

Assuming this to be so, and that the respondent did not expect that the party would act as agent, it is not a corrupt practice within the statute, as decided in the *West Peterborough Case*, Hodgins's E.C. 274, and there is nothing to create a doubt as to the *bona fides* of the payment of the money for expenses.

Then as to the expenditure by the respondent. He received \$500 from his father, who says that as the election would be attended with considerable expense he made him a present of it, but not a word was said between them as to what it was for.

A great deal of unnecessary mystery was made by the elder Gould in reference to the payment, and it was urged that this circumstance and the fact of an entry being made in the respondent's books of the sum so received not in the usual course of business, and after the protest had been entered, were circumstances which rendered it incumbent on the respondent to render a very strict and accurate account of the expenditure of that amount, and we were referred to the *Bradford Case*, 1 O'M. & H. 30, in support of that contention; but the cases are not similar. There the candidate opened an unlimited credit at his bankers in favour of his agent, who availed himself of it to the extent of £7,200, and who sent in to the returning officer a mere abstract of totals of outlay unaccompanied by vouchers, which was knowingly done contrary to the provisions of the 26 & 27 Vic. c. 29, s. 4.

The learned Judge under these circumstances held that the respondent was bound to prove the legality of every payment contained in the account from the beginning to the end of it.

This case is very different. The money was advanced by the father to the candidate knowing that there were expenses unavoidably attending an election contest. This sum was deposited at once by the candidate to his own account, and although every opportunity was afforded to the petitioner during the trial to investigate the candidate's books and cheques, and to cross-examine him upon them, no improper payment was discovered, and I thought until the matter was referred to on argument that the petitioner's counsel had satisfied himself.

The official return of the expenditure shews disbursements to the extent of \$304.95, in addition to which one or two payments were made for purposes shewn at the trial which appeared to be free from taint, but which ought to have appeared in the return. It is to be regretted that in cases of this kind candidates do not keep their funds intended to be devoted to election expenses entirely distinct from their other funds, so as to be able to

furnish at any time a precise and accurate account, not only of the sums expended, but to verify it by the balance still remaining to the credit of the fund. In the present case the candidate drew for his election his household and his business expenses indiscriminately from the same fund; but nothing has been shewn to throw any discredit upon his statement, and I think that on the whole the moneys received and deposited have been satisfactorily accounted for.

Charge No. 27.—A payment to one Patrick Haley, by the respondent, of \$10 to induce him to vote or refrain from voting—was not proved; but an amendment was allowed, it having been shewn that a payment of that amount had been made to him by D. M. Card. It is sworn that this was paid for expenses of Haley in going up for some voters some miles distant from Gravenhurst. A doubt is thrown upon the transaction, from the fact that a person of the name of Devlin was sent by Mr. Gillespie, another agent, on the same errand, but it is sworn that neither was aware of the other's acts, and the messenger who was sent by Gillespie was unable to get through in consequence of the heavy roads, and it is proved returned the money. I think there is no reason to suppose that the money was paid colourably or for any purpose other than that sworn to.

Charge number 30.—This charges Card, and, as amended, the respondent with promising one Genno to use his influence to prevent one McNabb, a rival tavern-keeper, getting a license, and to get one for Genno, in order to induce him to vote for him. The evidence of Genno himself clearly establishes that he advertised himself for sale, but there is not a particle of evidence to shew that his offer to sell himself was ever seriously entertained.

Charge number 29.—A similar charge, as regards the other tavern-keeper, is entirely unsupported by evidence,

Charge number 38.—It is not possible upon the evidence to hold that the treating by either of the Sharrards was a corrupt treating within the statute.

Charge number 105.—I think the evidence of Smith's agency is not sufficiently established, even if I could come to the conclusion that the corrupt practice is made out. I think that the evidence establishes that McNabb was not influenced by the treating, but acted as a free agent. The counsel for the petitioner had not much faith, evidently in the charge, as he applied to amend, so as to bring the case within section 157, which, I think, should not be allowed.

Charge No. 71—As charged, is the payment of the travelling expenses of one Shane from Newmarket to Uxbridge. The facts were, that one Somerville, an agent of the respondent, drove out with his own conveyance to Newmarket a few days before the poll, and brought Shane to his own house, where he remained as Somerville's guest until after the polling.

It is difficult to see how this comes within section 154; and although an amendment was asked for, so as to bring it within section 153, the case was very properly not pressed upon the argument, as it was clearly not within it.

This disposes of all the charges. We disposed of No. 22 at the hearing, and I only refer to it in consequence of the extraordinary disclosure made during its investigation, that meetings of the Reform association thought themselves justified in nominating and recommending to the returning officer persons to fill the position of deputy returning officers. It was urged in justification that it was done by the other side. All I can say is, that, by whomsoever done, it is a most reprehensible practice, and it cannot be too widely known that it is exceedingly improper.

The Legislature has very wisely provided that certain named officials shall be returning officers, and has placed it out of the power of the Government to name them unless in the case of the death, incapacity, or refusal of such official to act, so as to avoid the possibility of selecting a partizan to fill the position; and it is equally important that the deputy returning officers should be selected impartially by the returning officer for their fitness and aptitude.

for the position, and not at the dictation or suggestion of either of the parties to the contest or their supporters.

I am of opinion that the petition wholly fails, and should be dismissed, with costs.

OSLER, J. A.—The third paragraph of the petition alleges that the respondent, before, during, at, and after the election, was, by himself and by his agents, and by other persons on his behalf, guilty of corrupt practices “as defined by the Controverted Elections Act of Ontario;” and the first charge I shall consider is, a charge under one of the sections levelled against treating in the Election Act.

The Controverted Elections Act, R. S. O. ch. 11 sec. 2, sub-sec. 6, provides that “corrupt practices,” or “corrupt practice,” shall mean (*inter alia*) bribery, treating, and undue influence, or any of such offences, as defined by this or any Act of the Legislature, or recognized by the Common Law of the Parliament of England.” And although “treating” is not, any more than is “bribery,” defined *eo nomine* in either Act, we have two descriptions of the thing itself in the 152nd and 153rd sections of the Election Act. (R. S. O. ch. 10.)

This charge comprises items Nos. 1 to 7 of the particulars, and if proved involves the disqualification of the respondent, the allegation being that he did, at the time and place specified, corruptly provide, &c., spirituous or fermented liquor or strong drink to * * in order to induce the said * * to vote for the respondent, or to refrain from voting for the defeated candidate.

Upon the evidence of Joseph Barton and Thomas Ruan I find as a fact that the respondent did treat a number of persons at Thomas Card’s Hotel in Sunderland on the same evening that a public meeting was held for the purpose of promoting the election. It was, as they said, a general invitation to all in the bar. I thought these witnesses were truthful and reliable, and though the respondent denies having treated on the occasion, I think his memory is at fault. I impute his denial to nothing else.

The next question is, whether this was corrupt treating in order to be elected, or for being elected, or for the purpose of corruptly influencing the persons treated "to vote or refrain from voting," &c. We are asked to infer that it was, because the respondent was at the time engaged in his canvass, because the persons treated, or many of them, were probably about to attend the meeting to be held on that evening, and because it was not the respondent's general habit to treat.

In the *Staleybridge Case*, 1 O'M. & H. 73, Willes, J., in a passage which has been frequently cited, says, "The question whether or no there is 'corrupt' giving of meat and drink must, like every other question of intention, depend upon what was done, and, to a great extent, the extent to which it was done, the manner and way. And therefore it is a question which must always be more or less a question of fact."

In dealing with such a question I quote the remarks of the same learned Judge in the *Bodmin Case*, 1 O'M. & H. 125, "The Judge must satisfy his mind whether that which was done was really done in so unusual and suspicious a way that he ought to impute to the person who has done it a criminal intention in doing it, or whether the circumstances are such that it may fairly be imputed to the man's generosity, or his profusion, or his desire to express his good will to those who honestly help his cause, without resorting to the illegal means of attracting voters by means of an appeal to their appetites." I refer also to the *Carrickfergus Case*, 3 O'M. & H. 91, in which Mr. Justice Harrison says, "What then is corrupt treating? In point of fact it is very difficult to see the difference between corrupt treating and bribery, they run into one another." And again, "Corrupt treating then must mean, 'with the object and intention of influencing the vote.'" So also Willes, J., in the *Bodmin Case*, 20 L. T. N. S. 991, 1 O'M. & H. 117; and Blackburn, J., *North Norfolk*, 21 L. T. N. S. 249, 1 O'M. & H. 236.

If, in the case before us, it had appeared that the respondent, contrary to his usual habit, had indulged during his canvass in general and indiscriminate treating, we might, without much difficulty, have inferred that it was done with a corrupt—that is to say, an evil—intent. But I am wholly unable to impute such an intent to what, so far as the evidence shews, was one of the two or at most three occasions on which the respondent appears to have treated in the course of his canvass.

Treating *per se*, except when it comes within the 151st and 157th sections of the Election Act, R. S. O. ch. 10, is not illegal; and in dealing with a charge of corrupt treating under section 152, or treating on the nomination day, or day of polling, we cannot overlook what has been called the general practice or custom of the country prevalent among large classes of the community. This consideration has been acted upon over and over again in election trials, and although, as I have said, it may be easier to fasten a corrupt intent upon the man who in treating even once or twice during an election contest departs from what is his usual habit on other occasions, I cannot infer a corrupt intention from that fact alone. I refer to the *Kingston Case*, Hodgins's E. C. 625, 635, per Richards, C. J.; *The North Middlesex Case*, Hodgins's E. C. 376, per Spragge, C.; *Glengarry Ib.*, 17, 18, per Hagarty, C. J. In the *East Elgin Case*, Hodgins's E. C. 769, even general and indiscriminate treating was excused in a person addicted to the vice. Many of the English cases and of our own on this subject are collected in that case, and I do not find in them anything laid down which would justify me in holding that the respondent was on the facts here disclosed guilty of corrupt treating.

The charge of treating by Adams, I think should be disposed of in the same way. The charge is not formulated in the particulars, but was made without objection and relied upon.

Item No. 20 in the particulars charges a payment of money to Adams to be expended in corrupt treating or bribery. The respondent paid Adams the sum of

\$10, as he said, to pay for his expenses and time during the two or three or four days he was engaged in driving him about during his canvass, and also for his trouble in posting bills. Adams said nothing was said about posting bills when the money was paid, and in that respect he differs from the evidence of the respondent, though they agree that he was asked to post them. The petitioner urges that this was a colourable payment, and he relies upon the fact that it is not included in the respondent's account of his election expenses, as it undoubtedly ought to have been. But after hearing the evidence of Adams and the respondent upon this point, I am satisfied that the payment was not a colourable one, and I feel that the suspicion which was attachable to it from its omission from the account has been dispelled.

The next charge is that of treating one Archibald McNabb, by Joseph Smith on polling day. This charge is relied upon as one of corrupt treating under section 152, or, under section 153, as one of treating a voter on account of being about to vote or having voted. The evidence is the following :

McNabb, the voter, said, that he had intended to vote for Madill: that on the morning of polling day a short time before the poll opened he was in McMullen's tavern; Joseph Smith came in and said he wanted him to vote for Gould. He told him he would. They left the hotel together, going first to Smith's house where they stayed a short time, and thence to a tavern kept by one *Maybee*, near the station. There Smith treated him. He "coaxed him" a little while they were drinking; and from thence they went to the poll.

Maybee, the tavern keeper, a supporter of the respondent, said Smith "brought" McNabb there and treated him. Soon after Sinclair and Wilson came in and accused Smith of *stealing* McNabb, whereupon Smith said "take him," but McNabb would not go with them. Smith said McNabb did not tell him how he was going to vote, but that he had heard a rumour he was going to vote for

Gould. The treat was before 9 o'clock. Wilson said, that he and Sinclair followed McNabb and Smith to the hotel, saw them drinking there, and that he told Smith it was not right "to carry off our voter" whereupon Smith said McNabb had promised to vote for Gould.

I think the proper inference to be drawn from this evidence is, that the treat was given to McNabb on account of his being about to vote. Even if it was not corrupt treating within section 152, and I am not entirely satisfied that it was not, it plainly had such a connexion with or relation to the vote as to be brought within section 153. We have here a voter of no fixed opinions, a "loose fish," if I may use the expression, ready on his own shewing to vote on either side, asked by a supporter of the respondent to vote for him, and agreeing to do so, then accompanying the latter to his house, going into the tavern on their way to the poll and there treated, and from thence taken to the poll by his entertainer. In these circumstances it seems hardly to admit of doubt that the treat was given on account of the promised vote, and therefore I find the charge proved, if Smith's agency is made out.

As to this the evidence is, that Smith was a man who always took an active part in any election on the Reform side. That on one occasion at least, at the request of the Vice-President, he attended a meeting of the local political organization or committee for whose acts in the management of the election the respondent would be answerable: that at this meeting the voters' list was examined and election work done.

He is not proved to have been a member of the committee, and he says that he was not asked to do any work. He is not shewn to have canvassed, except in this particular instance, but on the polling day he was actively engaged in driving voters to the poll in his own conveyance. This, he says, he did as a mere volunteer.

With some doubt whether he and the tavern-keeper, May-bee, have told the whole truth upon this point, I think I must find that the agency is not sufficiently established.

I refer to the *East Peterborough Case*, Hodgins's E. C., 245, and the *South Norfolk Case*, Hodgins's E. C., 660-664.

The next charge is that of the respondent treating a meeting of electors at McVeigh's tavern.

If this charge depended upon the respondent's evidence, as given upon his examination before the trial, it would seem to be very clearly proved, as he admits that he treated a gathering of persons whom he believed to be his local committee, assembled for the purpose of promoting the election.

The only question, then, would be, whether a committee meeting or a meeting of the candidate's own supporters was a meeting of electors within the 151st section of the Act.

I confess I have felt great difficulty in dealing with this charge, because it is apparently admitted to its full extent by the respondent, and one of his own witnesses called to explain it away in some respects confirms it, and because the respondent was not himself asked at the trial to give any explanation of the circumstances detailed by him in his examination, or even to admit that after having heard the evidence of his other witnesses as to the occasion and object of the meeting he might possibly have been mistaken in what he says he saw and heard there. Upon the whole, however, looking at the evidence of Gillespie and Boulton, which I see no sufficient reason to discredit, I have arrived at the conclusion that the meeting in question was not a meeting of electors assembled for the purpose of promoting the election. No doubt the gathering at McVeigh's tavern was composed of persons who were supporters of the respondent, but I think they were not a committee or association formed for the purpose of promoting the election, or who met there on that occasion for that purpose. They were members of an association—a Reform association, as they called themselves—of a literary and social character, and for the promotion of reform principles, and were accidentally prevented from holding their meeting in the town hall on the evening in question.

No meeting was in fact, as I think, organized, although the members, instead of dispersing, remained at the hotel with the intention, which was not carried out, of holding the meeting there instead of in the hall. The interview with the respondent was not pre-arranged but seems to have been brought about by one of the members of the association who knew that there was to be a meeting of the association on that evening.

If, then, the meeting was not a meeting of a political organization for promoting the election, nor a general meeting intentionally called and assembled for that object, it seems to me that I should not be justified in holding it to be anything but a chance gathering of persons which could not, with any propriety, be called a meeting assembled for the purpose of promoting the election, even though the respondent might be present and matters relating to the election discussed at it.

I therefore find this charge not proved ; but, considering the evidence of the respondent and the suspicion which undoubtedly attaches to the association as regards its character and objects, I think that in no event should the respondent be allowed any costs relating to this portion of the case.

The next charge relates to a payment of \$5 to one McPhail.

McPhail was a teamster in the employ of the respondent, and on the polling day he sent him out with his team to drive voters to the poll at a polling subdivision at a distance from his home, and gave him \$5 to cover his expenses.

I fail to see how this can be an offence under the 154th section of the Act against hiring teams, &c., even though the driver, in some irregular way, seems to have obtained a certificate to enable him to vote at the poll to which he was driving up voters.

The charge of treating Johnston by Sharrard was dismissed on the hearing.

The next charge relates to the expenditure of money by the respondent during the election campaign. This is a

charge which was strongly urged on the argument, the inference we were asked to draw being, that the money not accounted for had been expended in bribery, or some other form of corrupt practice.

It is shewn that the respondent's father, on the 3rd of February, gave him a cheque for \$500. He did so because he knew he would be at considerable expense on account of the election. He could not remember whether the respondent had asked him for it or not, but nothing was said by either of them as to what it was given or required for. The cheque was deposited by the respondent in his bank account, but it was not entered in his cash book until some time afterwards. It was not charged against him by his father, nor was any entry of it made in the stub of the cheque book, contrary to the father's usual practice with regard to moneys given or advanced to the sons.

There is no such detailed account of the respondent's election expenses with bills and vouchers as is required by the 186th section of the Election Act, and from the account which has been made out, in assumed compliance with the section, the money paid to Adams is omitted. The result of a close examination of the respondent's accounts in respect of his business, household and election expenses during the election, is, that a sum of about \$160 has not been accounted for.

Such an enquiry as this is an ordeal to which candidates may expect to be subjected, nor can it be said to be unnecessary or improper, especially where the accounts of election expenses have not been properly kept. If there has been a lavish and unusual expenditure at so critical a period as that of an election contest, it may be impossible to avoid the conclusion that it has been of a corrupt character, if the respondent cannot or does not choose to explain it, as, for instance, in the *Bradford Case*, 1 O'M. & H. 30.

I do not, however, feel at all compelled to such a conclusion in the present case. The impression I have derived

from the evidence is, that the respondent, so far as he is individually concerned, has tried to conduct the election in a proper way, and I cannot doubt, looking at the searching nature of the enquiry which has evidently been made into his acts, that if anything like the sum in question had been improperly expended, or I may say expended by himself or by his agents, in excess of that generally accounted for, some trace of it would have come to light. At the most it might be said, though I do not say so, that there are suspicious circumstances connected with such expenditure. I cannot set aside an election or infer bribery on that ground. I refer to the observations of Richards, C. J., on this subject in the *West Toronto Case*, Hodgins's E. C., at p. 123.

Then there are charges 27, 34, 39.—The payment of \$10 by D. M. Card, an agent of the respondent, to Patrick Haley to go up to Gravenhurst for some voters resident there, and of \$4.00 by F. G. Gillespie to Devlin for the same purpose. The latter sum was returned to Gillespie, as Devlin did not go. The former was not mentioned in the respondent's account of his election expenditure, and was paid as Card says out of his own moneys, and not charged to the respondent. Suspicion attaches to this payment chiefly from the fact that Card denied in the most absolute and unqualified manner the payment of money to anyone outside of his own actual travelling expenses while canvassing, and only admitted this payment after Haley had spoken of it. Haley himself was evidently not a man who needed to be bribed, being a strong supporter of the respondent. He swears he did go to Muskoka and bring down a voter, and that his expenses were more than \$10. I find that these charges are not proved.

Charges 29, 30, and 106.—Bribery of Genno by promise of issuing a tavern license to him, and not to a rival tavern keeper, McNabb, and undue influence upon the latter, by threatening to deprive him of his license.

On the evidence of Genno and McNabb I should find neither of the charges proved, and if there is anything

equivocal in Genno's statement it is explained by the evidence of Card.

Charge No. 71.—Payment of the travelling expenses of the voter Shane.

One Somerville, an agent of the respondent, drove his own team to Newmarket for the purpose of bringing in the voter. He was a guest at Somerville's house for a day or two, and was driven home by Somerville's son after he had voted. I am of opinion that this does not come within the 154th section.

Charge 108.—Bribery of John Kyle and his wife by J. H. Patterson, who was admitted to be an agent of the respondent.

Mrs. *Kyle* said, that Patterson came to their house on the morning of polling day to see about her husband's vote, and wanted her to use her influence with him to vote for Gould. He told her "he would make it all right with her" or "with them." She told her husband this, who laughed and said he would do what he liked, and afterwards voted. They were in the habit of dealing at Patterson's store, and a few days after the election she reminded him of his promise, whereupon and in pursuance of it he gave her some groceries to the value of \$4.49. These, as I find, are the material facts relating to this charge. So far as Patterson's evidence differs from that given by the Kyles I have no hesitation in accepting the latter.

This charge is one which comes under the latter part of sub-sec. (a) and sub-sec. (c) of sec. 149 of the Election Act.

There is first the promise of some valuable consideration to the wife, to induce her to procure her husband to vote at the election for the respondent, or to him through her, to induce him to do so, in itself an act of bribery; and secondly, the gift to the wife, in consideration of the husband having voted, which was also an act of bribery, but with the additional circumstance that it was connected with and in fulfilment of the original corrupt promise.

It was urged very strongly that if the case stood upon the promise alone, there was no evidence of the promise of

any valuable consideration within the words of the section, the promise "to make it all right" with the wife, or with her and her husband, being too vague and indefinite to convey any meaning or assurance of a gift of any kind in consideration of the voting, &c.

We must, of course, look at the position of the parties, Patterson being a store keeper with whom the Kyles were in the habit of dealing, and to whom they were at the time indebted.

The decision of the Court of Appeal in the *Halton Case*, Hodgins's E. C., 283, seems to me to lay down in accordance with authority the principles upon which I ought to decide the present case, and I therefore make the following extracts from the judgment of Richards, C. J., at page 292: "In construing this statute, we must consider what was the intention of the Legislature; and there is no doubt the primary object was, that votes should be given from the conviction in the mind of the voters and those who supported a candidate that he was the best person for the situation, and that the public interests would be best served by electing him. The evil to be corrected was the supporting a candidate, not because he was the proper person, but *causâ lucri*. The supporting of the candidate because of personal benefit to himself; the exercise of the franchise not for the public good, but for personal gain in money or money's worth to the voter or the person inducing the elector to vote or not to vote, was what the Legislature wished to guard against.

"Then what was the motive presented to the mind of Mrs. Robins, in the case under consideration, to induce her husband not to vote against respondent? It was that she was to receive some substantial advantage from it, either in money or in property—something of value. She was to have a *nice present*. The evidence showed she considered it would be something of value—not of mere fanciful or imaginary value, but of real value that would be *appreciable*. What occurred would well justify her in supposing that the respondent intended to give her something of

value, and that he intended to give her, in the language of the statute, a valuable (not a fanciful) consideration for inducing her husband not to vote; and she, entertaining that belief, tried to induce her husband to abstain from voting. So that, in fact, the evil which the Legislature intended to prevent actually existed in this case. This woman was *corrupted* by the offer, and she endeavored to exercise an influence over her husband from the desire to get the *present* which had been promised her." And at p. 294: "But I do not understand that the promise must be one for which, were it not prohibited by the Corrupt Practices Act, an action would lie for the breach of it. The evidence of the promise requires to be satisfactory." Again, at p. 295. "The apparent motives of the party, and the inference from the Act itself, should influence our decision." The following passage from the *Launceston Case* is quoted: "*But when we are dealing with an election question, we must deal with the motives which are apparent, and which appear from the Act itself. I cannot go into any intention of Col. Deakin. I must be governed by what he said, and by the inferences I ought to draw from what he did and what he said.*" And see *Simpson v. Yeend*, L. R. 4 Q. B. 628: "It is so important to the public interest that electors should be left free to vote without any disturbing influence of any kind, that we feel ourselves bound, in construing the statute in question, to give full effect to the plain meaning of the words used, and to apply them to the substantial facts of the case, *without raising subtle distinctions or refinements as to the precise words or expressions in which the promise or offer may be conveyed.*" Referring to this passage, the Chief Justice concludes: "We have no doubt that the words used did substantially convey to the mind of Mrs. Robins that if she used her influence, as the respondent wished her to, she would, in the language just quoted, receive money or valuable consideration which she would not otherwise obtain, and this was calculated to operate on her mind as a direct inducement to do what the respondent wished."

Looking at the relation in which these persons stood to each other, and the obvious motives of Patterson, I cannot doubt that he intended to convey, and did convey, to Mrs. Kyle the idea that if she procured or would induce her husband to vote as he wished, she would receive something of value, whether in the shape of groceries, money, or an abatement of their debt.

To hold otherwise would, in the language of my Brother Burton, in the case from which I have quoted so largely, be "to open the door to every kind of ingenious evasion of the Act."

I have not referred as yet, in dealing with the question of the sufficiency of the promise, to the fact that a few days after the election it was implemented and its meaning explained by the gift of some groceries by Patterson to Mrs. Kyle. This, as I have said, was, in itself an act of bribery, and if it had stood alone it would have been necessary to carry the evidence of agency further.

But I am of opinion, that as it is shewn to have been connected with and to have been done in carrying out the previous corrupt offer, it was properly proved for the purpose of shewing what both parties understood that offer to be, and to that extent the respondent is affected by what was done after the election. I refer to the *Galway Case*, 2 O'M. & H. 49, as laying down a satisfactory rule on this subject, and to the *Brockville Case*, Hodgins's E. C., 139, 152; *Rogers on Elections*, ed. 1880, (13th) p. 356, and note (u).

The last charge is that of the bribery of Powell by Patterson. The sum said to have been paid is fifteen cents or twenty-five cents. I do not think it necessary to go over the evidence in detail. With much doubt, and taking the most favourable view of it, I have come to the conclusion that it is not made out.

Since writing the foregoing I have seen the *North Victoria Case*, Hodgins's E. C. 252, 262, decided in 1875, not cited on the argument. In that case one of the charges was that Malcolm McDougall, an agent of the respondent,

had attempted to bribe Ralph Simpson. and the evidence was, that McDougall said to Simpson he would like him to vote for the respondent, and that if he would he would see him another day, *and that things would be made right.* Chief Justice Draper, by whom the case was tried, said : "I think the evidence falls short of what is required to bring the case within the statute. There was no gift or loan of money, or offer or promise of money or valuable consideration. It would, I think, be a forced and unwarrantable construction of the words 'he would see me another time, and things would be made right,' to hold them to import an undertaking fraught with penal consequences." Some weight seems to have been attached to McDougall's denial that he said anything to Simpson to induce him to change, by way of promise or otherwise. Still the terms of the corrupt offer or promise in that case and in the one before me are so nearly identical, that if there had been nothing more than the promise proved I should have thought it right to follow the decision of that most eminent Judge, and not the less readily because my Brother Burton, as I understand, takes a similar view. I shall, however, allow what I have written to stand, as it expresses my own present opinion, and because there is here the additional element of a subsequent explanation and performance of the promise or offer made by Patterson.

Upon the whole case, therefore, a single corrupt act has been proved in my judgment to have been committed by an agent, but without the knowle'dge and consent of the candidate, and the question is, whether that corrupt act should avoid the election, or whether the case is a proper one for the application of section 159. Upon the whole I think the election ought not to be avoided. It is true the majority is very small, I think only 20, but the corrupt practice, though not of a trifling nature, was one of trifling extent in so far as it consisted in the bribery of one person only. Had more than one act of bribery been proved either against Patterson or any other agent, or if the act proved had been one not merely of bribing Kyle's own

vote, but of enabling him to bribe others, in any direction; either by giving him money or employing him to canvass, I should have felt great difficulty in giving the respondent the benefit of the section. But here the act must have begun and ended with Kyle alone, and therefore I do not see how, in the language of the section, I can reasonably suppose the result to have been affected by it. I purposely refrain from expressing any opinion as to the scope of the section, or how it should be applied in other cases; a very slight difference in the facts might induce me to think it not applicable. I cannot but feel that its tendency is mischievous, and that the greatest caution is requisite in acting upon it.

As to costs, I suppose the petitioner should have them as if the Kyle charge were the only one, but nothing more.

I shall therefore report that it has been proved to my satisfaction that a corrupt act has been committed by an agent of the respondent without the knowledge and consent of the candidate, but the same was of such trifling extent that the result cannot have been affected, or be reasonably supposed to have been affected thereby, and therefore that the election is not avoided thereby.

2. That the respondent is duly elected and returned.

3. That no corrupt practice has been proved to have been committed by or with the knowledge and consent of any candidate at the election; and

4. That there is no reason to believe that corrupt practices have extensively prevailed at the election to which the petition relates.

G. A. B.

WEST NORTHUMBERLAND.

DOMINION ELECTION.

BEFORE THE HON. CHIEF JUSTICE CAMERON.

COBOURG, 7th and 8th January, 1884.

JOHN HARDMAN AND HENRY T. SNELGROVE, *Petitioners*, v.
GEORGE GUILLET, *Respondent*.*Treating—Bribery—Betting with voter that he would vote—Corrupt Acts.*

When an act or expression is equivocal, and may in one aspect denote something wrong or criminal, and in another aspect be quite innocent, the latter should be adopted as denoting the true meaning of the expression or tendency of the act, unless the surrounding circumstances repel its adoption.

The corrupt acts alleged in this case were the treating of B. a voter by respondent's agent H. by giving him a glass of whiskey, and two sums of money, \$2 and \$50 respectively. The treating, according to B.'s evidence, was nothing more than an act of good fellowship; and according to H.'s account, that B. was not feeling well, and the whiskey was given in consequence. The \$50 was given B. to induce him to go away in the hope that his absence would prevent proceedings being taken against B. on account of his treating and giving B. the \$2; and not by reason of any previous arrangement between them that B. should receive anything. The \$2 was given on the polling day, but after the close of the poll. B. negatived that it was paid him for his vote, and stated that it was given him to buy whiskey going home; while H. stated that he supposed it was a dollar bill, and told B. to go and treat the boys with it; and that it was not given on account of any previous promise, or for his having voted.

Held, that none of these acts constituted corrupt acts so as to avoid the election.

A further corrupt act was a bet by R., respondent's agent, that one P. would not vote. R. swore that he made the bet not with any intention of influencing P.'s vote, which he knew such a bet would not do, but as a sporting bet made on the spur of the moment, with the expectation that, as he said, P. would warm up and vote; while P. swore that the \$5 would not have prevented his voting if he intended to do so, and that he had made up his mind not to vote before the bet was made.

Held, also, that this was not a corrupt act.

The petition contained the usual allegations of bribery &c., and claimed to have the election avoided.

Bethune, Q. C., and W. Kerr, Q. C., for the petitioners.

McCarthy, Q. C., and H. F. Holland for the respondent.

The facts, so far as material, are stated in the judgment of the learned Judge.

May 12, 1884. CAMERON, C. J.—At the close of the case for the petitioners, there were only two cases of alleged corrupt practices, committed by agents of the respondent, upon which Mr. Bethune, Q. C., counsel for the petitioners, claimed to have the election avoided.

These were contained in the particulars of corrupt practices, delivered by the petitioners to the respondents, in paragraphs Nos. 1, 2, 8, and 9, and were as follows :

1. Raphael Beauvois, * * was, on the 20th day of June, 1882, at the township of Haldimand, by Thomas Heenan, * * an agent of the respondent, treated, contrary to section 94 of the Dominion Election Act of 1874, and promised the sum of \$50, or some other valuable consideration, to induce the said Raphael Beauvois to vote for the said respondent at the said election.

2. The said Raphael Beauvois, at the time and place aforesaid, was, by the said Thomas Heenan, treated, contrary to section 94 of the Dominion Election Act, 1874, and paid the sum of \$2 on account of the said Raphael Beauvois having voted for the respondent at the said election.

8. John Parker, * * was, on or about the 17th day of June, 1882, * * paid the sum of \$5 and treated, contrary to section 94 of the Dominion Election Act, 1874, by Robert Roderick Pringle, * * an agent of the respondent, in order to induce the said John Parker to refrain from voting at the said election.

9. John Parker was, on or about the 30th day of June, 1882, paid the sum of \$5, or some other valuable consideration, by Robert Roderick Pringle, an agent of the respondent, on account of the said John Parker having refrained from voting at the said election.

The charges contained in paragraphs 1 and 2 depend upon the evidence of Raphael Beauvois and Thomas Heenan, as to the commission of the alleged corrupt acts. There is other evidence upon the question as to Heenan's being an agent of the respondent.

In the view I take of the effect of the evidence as to the corrupt acts, it will not be necessary to consider the question of agency.

The corrupt acts indicated by the evidence are two—treating and giving money to Beauvois.

There is no doubt about the act of treating, nor of the giving two distinct sums of money—\$2 and \$50—by Heenan to Beauvois. The question is not free altogether from doubt as to the motive with which the acts were committed. The treating was not such as avoided the election, unless it was done with the object of influencing Beauvois. He does not seem to have regarded it in that light himself, and I see nothing from which I can draw the conclusion that the two treats before Beauvois voted, were other than acts of so-called or considered good fellowship, taking Beauvois's account to be correct; and they certainly would not be so if Heenan's version was the right one, which was, that Beauvois was complaining of not feeling well, and he gave him the whiskey in consequence.

With regard to the giving of the \$50 to Beauvois at McGrath's, though it was a very foolish thing on Heenan's part to do, I think it was given, as Heenan puts it, to induce Beauvois to go and see his friends, in the hope that his absence would prevent proceedings being taken against him (Heenan) on account of his treating and giving Beauvois the \$2 on the polling day, and not by reason of any previous arrangement between them that Beauvois should receive anything for his vote. There would seem little room to doubt, from Beauvois's statement, that he expected something; but he had, according to his own view of the matter, no reason to expect anything other than the fact that Heenan had urged him very earnestly to vote for the

respondent, or, to use his own language, had coaxed and coaxed him to do so, and had repeatedly said he would not be sorry for it. Heenan was strongly in favour of the National Policy, as the principle of protection in contradistinction to free trade is termed ; and if he believed that such policy was really in the interest of the country, and I see no reason to doubt he did so believe, he might well say to a farmer that he was urging to support the candidate who upheld that policy that, by voting against its opponent, though of his own party, he would not be sorry, and that expression was not pregnant with the hope of any immediate, direct, and individual advantage to flow from the act of voting to the voter himself, that could not be enjoyed by others in like circumstances with himself. When an act or expression is equivocal, and may in one aspect denote something wrong, or criminal, and in another aspect be quite innocent, the latter should be adopted as denoting the true meaning of the expression or tendency of the act, unless the surrounding circumstances repel its adoption. Beauvois's account of what took place between him and Heenan at Warkworth, just before the \$50 were mysteriously conveyed to him, when at dinner, in an envelope, is far from clear, owing probably to his want of familiarity with the English language ; but, as far as it is intelligible, it agrees with Heenan's account that the money was given to him in order that he might go and visit his friends, to be out of the way.

I have, therefore, come to the conclusion it would not be proper to connect the giving of that money with any antecedent arrangement or promise on Heenan's part.

There remains to be considered, the object and effect of the giving of the \$2 by Heenan to Beauvois behind the school house, after he had voted. That payment being made after Beauvois had voted, would not be a corrupt act, unless it was made in consequence of some direct agreement or promise made by Heenan, or conduct or action on his part from which he intended Beauvois to draw the conclusion, or inference, that if he voted for the

respondent he would be paid for voting. Beauvois, in his evidence, expressly negatives that the \$2 were paid to him for his vote, and says that when Heenan gave him the money he said that would buy him whiskey coming home. Heenan's account is, that he supposed it was a dollar bill he gave him, and told him to treat the boys with it; and he swears most distinctly that it was not given on account of any previous promise, or on account of his having voted.

I think, under the circumstances, he had no business to give Beauvois the money; and if I had never read an authority upon the point, and was dealing with the question as one in which the public interests alone were concerned, I would say it was so suspicious that the election should be avoided; but, having regard to decisions upon similar questions, I am unable to say that this evidence establishes with reasonable certainty that the payment was corruptly made, that is, by reason of some previous promise or understanding, and a previous promise or understanding is essential to make a payment to a voter after he has voted a corrupt act.

This is the effect of the opinion of Baron Martin in the *Second Bradford Election Case*, 19 L. T. N. S. 723, and of Mr. Justice Lush, in the *Brecon Election Case*, 2 O'M. & H. 43, at p. 44. Mr. Justice Lush was considering the question of corrupt treating; but the same meaning must be assigned to the word "corrupt," as used in the latter clause of sub-sec. 2 of sec. 92 of the Dominion Act of 1874, as was given to the latter part of sec. 4 of the Imperial Act, 17 & 18 Vic. ch. 102.

In the *Monck Election Case*, Hodgins 154, Mr. Justice Galt held the following evidence did not sustain a charge of bribery: "Adam V. Moot—I am a voter in this division. I voted for Mr. Edgar. David Winslow came to my house before the polling. He asked me if I was coming out to vote. I said I did not know it would be worth my while, because I was a hired man. I said I would consider it a day lost if I went out to vote, which would cost me a dollar. He said, 'Come out, and your \$1.00 will be all right.'"

This was only an offer : it did not appear to have been performed, and the authorities seem to decide beyond question that in the case of an offer not carried out, the evidence must be stronger than in a case where there has been a completed act. This, I presume, is because the thing done is in itself evidence of the corrupt act, and strengthens that which would otherwise have been too weak to produce conviction.

In the present case, the voter swore that when he asked Heenan for something for his vote, Heenan told him he could not give him anything—that he dare not do so ; and had the \$2 been given, as it was, if no more had been said between them, there would be no ground whatever for adopting the view that the \$2 were given on account of a corrupt understanding. But, in addition, there was the repeated statement, if he voted with him he would not be sorry. This statement, by itself, would amount to nothing: see *North Victoria Election Case*, Hodgins 252. Can it properly, in the face of the statement of both Beauvois and Heenan, that the money was not paid for the vote, be construed to have been a payment made in consequence of some understanding or arrangement made beforehand. I do not think, regard being had to the respondent's strict rights, it can.

The question presented under paragraphs 8 and 9, by the evidence, was a bet made by Robert Roderick Pringle, an admitted agent of the respondent, and the money paid in consequence of such bet, a payment of money in order to induce John Parker, a voter, to refrain from voting. The bet was made directly with the voter, that he would vote at the election, consequently, as he would gain \$5, the amount of the bet, if he did not vote, and would have to pay \$5 if he did vote, the effect of the bet was undeniably an inducement to him not to vote ; and if the probable effect alone were to be considered, without reference to the intention of the parties making the bet, the election would have to be avoided. But it appears to me it is the motive or intention that constitutes the corrupt act, and not the result merely ; though I think in these election cases, as

well as in criminal cases, the intention may be inferred from the probable result of the act done. Pringle swears positively that he did not make the bet with any intention of influencing Parker's vote, but as a sporting bet, with the expectation of winning, as he believed the voter would warm up, and that \$5 would not have induced him to refrain from voting if he wished to do so. Parker himself said it would not, and that he had fully resolved not to vote before the bet was made. I cannot, in the face of Pringle's positive assertion that the bet was not made with the object of influencing Parker to refrain from voting, say that it was, because it is not impossible, or improbable, that such a bet could be made without such intention; and the surrounding circumstances rather strengthen than weaken the probability that it was made without any such intention. Had Pringle been canvassing the voter and found in him a disinclination to vote, though not a resolution not to do so, and he made the bet, I should have had little hesitation in holding that it was made expressly to convert disinclination into resolution, and thus it would be a clear contravention of the Act. But the meeting between them was, as far as the evidence discloses, without premeditation; and the bet was a thing done upon the spur of the moment, when Pringle was told by Brown that Parker said he would not vote.

While I do not think I can properly hold this bet was made with the intention of inducing Parker to refrain from voting, it comes dangerously near leading to that conclusion.

On the whole case, it seems to me that a decision for or against the validity of the election could not be said to be absolutely wrong; and the direct statement of the witnesses that, in what was done, there was no corrupt intention being in favour of its validity, and only inferences that may be drawn from the acts so affirmed under oath to be innocent against it, I must, in submission to the current of authority in like cases, lean to the side of validity.

There can be no question I think, upon the evidence, that the respondent himself desired to have a pure election, and nothing verging in the slightest upon improper conduct on his part appears.

The language of Baron Martin in the *Wigan Election Case*, 1 O'M. & H. 188, at p. 192, may properly be applied to the circumstances of this case. He said: "If I am satisfied that the candidates honestly intended to comply with the law, and meant to obey it, and that they themselves did not act contrary to the law, and *bond fide* intended that no person employed in the election should do any act contrary to the law, I will not unseat such a person upon the supposed act of an agent, unless the act is established to my entire satisfaction. Things may have been done at an election of which I do not approve—for instance, having committees at public houses, hiring a number of carriages * * or hiring roughs—but which do not of themselves avoid an election. They are ingredients which may be taken into consideration, and they may tend to shew what was the real quality and meaning of an ambiguous act, which may have one effect or another, according as the Judge's mind is satisfied that it was honestly or dishonestly done. It may be that at an election certain acts have taken place which the Judge disapproves of, but which do not satisfy him that another act upon which the validity of the election depends was corruptly done."

In the *East Toronto Election Case*, Hodgins 96, Richards, C. J., quoted this language with approval, and, applying it to the case then before him, said: "I have not that clear and satisfactory evidence of acts contrary to law, done by his agents, which will, in my opinion, justify me in declaring the election of the respondent void, and it therefore becomes my duty to declare the respondent was duly elected."

I think no one can read the evidence given in that case and say that case was properly determined, if this should be set aside. There is nothing in this case that can give

any colour or bearing to the acts complained of, except the circumstances immediately surrounding or connected with the acts themselves, and, as I have already said, these are not sufficient to justify me in placing the construction upon them that they were not innocent, but corrupt.

From the cases in which I have differed from other Judges, I am led to believe that my own mind is too prone to adopt an unfavourable view to respondents in these election trials, biased perhaps by the consideration that the public interests require that the people's representatives should be chosen without undue influence of any kind being practised upon the electors, or any of them, and that the surest way of putting an end to corrupt practices would be, to vacate every election in which they appear to have been practised by a candidate, or an agent, to the most trifling extent.

If it were necessary in this case to decide whether Heenan was an agent or not of the respondent, I should be inclined to hold that he was. I am quite sure, from what appeared at the trial, the respondent would have been anxious to secure the influence and assistance of Heenan; and I think he was disposed to regard his presence with him in the neighbourhood of Bramley as beneficial to his cause, and no direct request on his part to Heenan to canvass for him would have indicated to me he accepted his services more distinctly than what did take place.

I declare the respondent duly elected, and the petition dismissed, with costs to be paid by the petitioners to the respondent.

NOTE.—The decision has been reversed by the Supreme Court, but the judgment has not yet been reported.

LENNOX.

PROVINCIAL ELECTION.

BEFORE MR. JUSTICE GALT AND MR. JUSTICE OSLER.

NAPANEE, *September 10, 11, and 12, 1884.*

BEFORE THE COURT OF APPEAL.

Present :—CHIEF JUSTICE SPRAGGE, MR. JUSTICE BURTON, MR.
JUSTICE PATTERSON, AND MR. JUSTICE CAMERON.TORONTO, *January 10, 1884.*EZEKIEL BIGBEE MILES, *Petitioner*, v. ALEXANDER HALL
ROE, *Respondent*.*Corrupt practice—Agency—Treating—Paying canvassers.*

L. being a municipal councillor, and as such a member of an association which had brought out the respondent as a candidate for election, had a personal disagreement with the respondent, and refused to attend the meeting of the nominating committee when the respondent received the nomination, and when asked by the respondent to support him refused so to do, saying that he now had an opportunity of getting even with him ; but without the knowledge of the respondent he took an interest in the election and bribed a voter.

Held, that he was not an agent of the respondent, and that there was evidence tending to shew that he was acting treacherously towards him.

S. being an agent of the respondent, on the election day brought some whiskey to a blacksmith shop near a poll, being a place where the neighbours were in the habit of congregating to warm themselves, &c., there being no tavern or public house in the neighbourhood, and treated them present (most of them being voters) without reference to their voting, and without distinction as to which side they supported.

Held, not a corrupt practice.

Certain parties were paid as canvassers in behalf of the respondent.

Held, not a corrupt practice.

THE petition contained the usual charges of corrupt practices.

The evidence on the most strongly contested charges went to show that one Lowry, who was a municipal

councillor, and as such a member of the Liberal Conservative Association, which association had brought out the respondent as a candidate, had paid one Taylor the sum of two dollars for a cat; but that the said Lowry had had a disagreement with the respondent, because the respondent had opposed him in a municipal contest, and had refused to attend the meeting of the nominating committee of the association when the respondent was nominated; and when asked by the respondent to support him, and by the secretary of the association to lay aside his personal differences, he had refused to do so, and had expressed his determination of getting even with the respondent, and had afterwards, without the respondent's knowledge, taken an interest in the election on behalf of the respondent, and had made the payment referred to. The evidence also showed that one John Storms, an agent of the respondent, had some whiskey on the polling day in a blacksmith's shop near one of the polling booths, a place where the neighbours were in the habit of congregating to warm themselves, &c., there being no tavern or public house in the neighbourhood, and had treated those present, most of whom were voters, but without reference to their voting and without distinction as to which side they were supporters of; and that money had been paid to several parties as canvassers.

The majority by which the successful candidate was elected was 173.

Mr. J. K. Kerr, Q. C., *Mr. Clute*, and *Mr. Johnston*, appeared for the petitioner.

Mr. Hector Cameron, Q. C., *Mr. G. T. Blackstock*, and *Mr. Hooper*, appeared for the respondent.

Judgment was given at the trial, after the evidence was heard, dismissing most of the charges, but the Lowry and Taylor charges were pressed in argument.

MR. JUSTICE OSLER.—I think Taylor's case is proved, so that you can confine yourself to the question of Lowry's agency.

Mr. Kerr, argued further on the question of Lowry's agency.

MR. JUSTICE GALT.—How can a man be an agent of another, when that man applies to the other and asks him if he will support him and he positively refuses? By what process can you constitute that man the agent of the respondent, unless something took place afterwards which was brought to the knowledge of the respondent, and to which he assented or consented?

MR. JUSTICE OSLER.—The very fact that Lowry did not attend the meeting of the nominating committee, is a fact against his being an agent, and goes to shew that he did not intend to support him. *Mr. Lowry* was *ex officio* a member of the nominating committee, we will assume, by being a member of the town council, he being a Conservative. I suppose that is a fact which is also proved. But it is also proved that he did not attend the annual meeting, and that he did not attend the meeting of the nominating committee. Those two facts, if there had been nothing else, would have been very strong facts in support of the contention of the respondent that Lowry was not his agent for the purpose of that election, because he did not appear to have acted on the nominating committee, and had not attended the annual meeting; but beyond all, there is the fact that there had been distinct and warm personal difference between the respondent and Lowry. I don't say that that would always be an answer, but these questions of agency depend upon the circumstances of each case, and although a man may support a candidate against whom he has feelings of prejudice, yet, the fact that he is a personal enemy or opponent to the candidate is in itself a circumstance that the candidate may rely on, when it is sought to fix him through an agent, and when the only instances of agency are those which are directly harmful to him. There is, then, the fact of personal opposition on the part of the person sought to be proved to be an agent. Beyond that there is the fact which is distinctly sworn to by *Mr. Elliott* and *Mr. Roe*, by *Mr.*

Elliott in particular, that Lowry was asked by Elliott to lay aside these personal differences and to support the candidate of the party: that he positively refused, and would have nothing to do with it; he absolutely refused to support Mr. Roe in any way, and he refused to attend the meetings; he threatened Mr. Roe twice that he would remember him for the opposition at the municipal election, and that state of things continued up to the evening before the polling day. Neither Mr. Roe, nor Mr. Elliott, nor any other person, so far as we know, except Mr. Murney Bartells, have any notice or information of Mr. Lowry's change of opinion.

I say, if under those circumstances, a candidate can be fixed with the acts of such a person then it is very difficult to see how a man can be a candidate at all without being liable to be unseated by the acts of a personal enemy.

The acts of Mr. Lowry appear to be more in the nature of acts done for the purpose of "getting even" with Mr. Roe, as he expressed himself, than for the *bonâ fide* purpose of obtaining votes, at whatever cost they might be obtained, and for those reasons it appears to me that Lowry is not an agent of the respondent. I express no opinion as to what his position would have been, if nothing more had been shown than that he was a member of the nominating committee. I act in the conclusion I come to upon the evidence as to the other facts I have mentioned.

So far as findings of fact upon the different charges is concerned, I think it satisfactorily proved that Lowry did bribe Taylor, the negro, in the cat case. I quite believe what Taylor was saying, but I think it is not proved that he bribed Warner; and Harrison's case is out of the question. I don't think it is proved that he bribed Scheffel. From what Scheffel himself says, I don't think the offer was seriously made.

That in my judgment is the way in which those charges should be disposed of.

Judgment was reserved as to charges 81 to 85, and the Court adjourned until Saturday the 22nd of September, at Osgoode Hall, Toronto.

September 22, 1883. GALT, J.—At the close of the case my Brother Osler and myself announced we should report that no corrupt practice had been proved to have been committed by or with the knowledge and consent of the respondent, Alexander Hall Roe, and that there was no reason to believe that corrupt practices had extensively prevailed at the election to which the petition relates. There were however, several charges, numbered from 81 to 85 inclusive, on which we refrained from giving judgment at the trial, and which we reserved for future consideration. They had reference to acts done by agents and not by the respondent, personally, nor with his knowledge or consent, and cannot therefore affect the result of the election, as they were (if corrupt, which is the question now before us) of such trifling nature and extent that in my opinion the result cannot have been affected or be reasonably supposed to have been affected by such acts. The charges are as follows :

No. 81. Wesley Brown, of the township of Ernestown, in said county, agent of the said respondent, did at the township of Ernestown, on the 27th February; 1883, carry whiskey, drink, and refreshment on his person within the limits of polling sub-division No. 5, of the township of Ernestown, for the purpose of supplying voters with the same, and the said Wesley Brown did supply drink, refreshment, and whiskey to the voters generally on said polling day to induce them to vote for the respondent at said election.

82. John Storms, of the said township of Ernestown, yeoman, an agent of the said respondent, did, at the township of Ernestown, aforesaid, on the 27th day of February, 1883, being polling day at said election, carry drink, refreshment, and whiskey on his person, being within the limits of polling subdivision No. 5 of the township of Ernestown, for the purpose of supplying the same to voters; and the said John Storms did supply drink, refresh-

ments, and whiskey to the voters generally on said polling day at said election to induce, compel or prevail upon them to vote for the said respondent at said election.

83. And the said Wesley Brown and John Storms, agents of the said respondent, did on or about the 27th day of February, 1883, at the said township of Ernestown, within the limits of polling subdivision No. 5, supply drink, refreshment, whiskey or other intoxicating liquors to Francis Jackson, William O'Meara, Chester Peters, Ruggles Storms, James Lapum, Robert Reid, Ira D. Hartman, Levi Brown, Sagar Brown, John Warner, and William J. Warner, all of the said township of Ernestown, farmers, to induce them and each of them to vote for the said respondent at the said election, and also to induce the said voters to procure or endeavour to procure the return of the said respondent to serve in the Legislative Assembly of Ontario for the Electoral District of the county of Lennox.

84. The said Wesley Brown and John Storms did treat, or provide and furnish drink, intoxicating liquors, whiskey, and other refreshment to voters at meetings of the electors assembled for the purpose of promoting the election of the respondent, and they, the said John Storms and Wesley Brown, on or about the 21st day of February, 1883, did pay for such drink and entertainment furnished to the electors assembled within said polling subdivision No. 5, and at McKay's hotel, in the village of Odessa, in the aforesaid township of Ernestown; and such drink and other entertainment was so furnished to said electors to induce them to vote for the said respondent at said election, and also for the purpose of inducing the said electors to procure or endeavour to procure the return of the said respondent to serve in the Legislative Assembly of Ontario for the Electoral District of the county of Lennox.

85. The said John Storms did, on the 27th day of February, 1883, at the township of Ernestown, keep a supply of whiskey, drink, intoxicating liquors, or other refreshments, in Lockwood's blacksmith shop, being within a distance of fifty yards from the polling booth in said polling sub-division No. 5, at the village of Wilton, and did supply whiskey, drink, intoxicating liquors, and other refreshments, to William Lockwood, William O'Meara, and to the voters generally, to induce them to vote for the respondent at said election, also to induce them to procure or endeavour to procure the return of the respondent to

serve in the Legislative Assembly of Ontario, for the Electoral District of the county of Lennox.

There is no evidence to sustain charge 81. Wesley Brown was examined. He stated he saw whiskey at Lockwood's shop, and took a drink himself, but there is no evidence that he carried whiskey himself or gave any to any other persons. This charge therefore is dismissed, and so are charges 83 and 84, so far as they relate to him. As respects the charges against John Storms, 82, 83, and 85, it was proved and was admitted by him that he took a bottle of whiskey in his cutter to Lockwood's shop, and this whiskey was drank by the persons assembled there, but there is no evidence whatever that it was given to influence the votes of the persons partaking of it.

The learned counsel for the petitioner, however, contended, that under R. S. O. ch. 10 sec. 153, this was a corrupt practice, because as the polling was then going on, and the persons partaking of the spirits were some of them voters and had come to that place to vote, we must hold that Storms, who was admitted to be an agent of the respondent, was guilty of a corrupt practice under that section; and he relied on the decision lately given by Patterson, J. A., and Ferguson, J., in the *West Simcoe Election* as sustaining that view. The circumstances of that case and the present are however quite different. I agree in the opinion formed by the learned Judges who tried that case, that the refreshments there provided were furnished on account of the persons partaking of them "being about to vote or having voted" but in that now before us there is no such evidence, the only fact proved being that a small quantity of whiskey was brought to the blacksmith's shop, where according to the evidence of the proprietor himself "there was a crowd there, voters on both sides were in my shop, Hawley's friends drank out of the bottle the same as the others. I was supporting Mr. Hawley."

The 153rd sec. is, "The giving or causing to be given to any voter on the nomination day, or day of polling, on

account of such voter being about to vote or having voted, any meal, drink, or refreshment, or any money or ticket to enable such voter to procure refreshment, shall be deemed a corrupt practice."

It appears to me that to constitute the giving refreshments a corrupt practice it must be shewn it was given to a voter on account of such voter being about to vote or having voted. Otherwise, as was contended by Mr. Blackstock, counsel for respondent, we make sec. 153, which contains a qualification, as absolute as sec. 157, which is unconditional. In my opinion therefore these charges 82, 83, and 85 should be dismissed, as the evidence does not support them. As respects charge 84 there was no evidence. This charge, therefore, is dismissed.

OSLER, J. A.—I agree with what has been said by my Brother Galt as to charges numbers 81 and 84. I think they were disproved. So also was charge number 83 so far as it relates to Wesley Brown.

The remaining charges upon which we reserved judgment are those numbered 82, 83, and 85, in the particulars, in all of which it is alleged that the acts therein attributed to John Storms were done by him to induce the voters referred to therein to vote for the respondent, and also to induce them to procure or endeavour to procure the return of the respondent to serve in the Legislative Assembly for the electoral district of the county of Lennox.

It was proved, and I think also admitted by counsel for the respondent, that John Storms was an agent of the respondent.

It was also proved that at some time during the polling day, and, as I find, during the afternoon, Storms gave whiskey to several persons, electors and others, at a blacksmith's shop near polling sub-division No. 1, Ernestown, a place frequented by such persons for the purpose of warming themselves, there being no tavern or other place of resort in the neighbourhood. The quantity of liquor thus disposed of was probably a couple of quarts.

It was contended that Storms's acts were corrupt practices within secs. 152 and 153 of the Election Act (R. S. O. c. 10).

I am of opinion that they were not corrupt practices under the former section, because the evidence satisfies me that the treating was not done with an evil mind or intention, that is to say, with any intention to influence or promote the election. What occurred was nothing more than the common practice, which prevails so much in this country of people treating or drinking together when they meet, unaccompanied by any ulterior intention, and without reference to the question of voting.

The 153rd section was the one chiefly relied on. This section enacts that "the giving or causing to be given to any voter on the nomination day or day of polling, *on account of such voter being about to vote or having voted*, any meat, drink, or refreshment, or any money or ticket to enable such voter to procure refreshment, shall be deemed a corrupt practice," &c.

It was strongly contended that the mere act of giving liquor to voters on the nomination day or day of polling, assuming it to have been done under the circumstances and for the purpose already described, and wholly irrespective of any question of intention, was a corrupt practice under section 153, and avoided the election. I do not desire at present to decide whether there may be an infraction of this section without the existence of a corrupt intent, or whether in view of the difference between the language of secs. 4 and 23 of the English Act 17 & 18 Vic. ch. 102, and that used in secs. 152 and 153 of our Act, the latter section must necessarily receive the same construction as the corresponding section of the English Act. I express no opinion either way as to this. The consequences of any infraction of the section are highly penal, and we must be careful not to extend it to any case which does not plainly come within its terms. Full effect must be given to the expression "on account of such voter being about to vote or having voted." It will not do to say "If

there had been no voting the voter would not have been there, and then there would have been no treating (so to call it); therefore the treating must have been on account of the voter having voted or being about to vote." The meat, drink, or refreshment must, in my opinion, have been given with reference to and in connection with the voting. I am content for the purposes of the present case to say that the practice struck at by the section is one more of the nature of that described by Mr. Justice Willes, in the *Bodmin Case*, 1 O'M. & H. 122. He says, "It should seem to have been usual in former times, and no doubt was the practice at least up to the year 1854, when the Corrupt Practices Act was passed, without any improper design upon the voters, and with a view to profusion, which some might dignify by the name of hospitality, to give to every voter who came up pledged for a candidate, or who had voted for a candidate, at the election, refreshment, either by opening a common table at some inn where the voters breakfasted before they went to the poll, or where they had refreshments before they left the town, after polling, and before they returned to their homes. I cannot help thinking that that was the sort of practice with which, whether corrupt or not, the Legislature was dealing in the 23rd section of the statute." I do not mean to say that the section is directed merely against a practice of keeping open house for voters on nomination or polling days, which is not by that name made an illegal or corrupt practice under the existing statutes, but which would no doubt come within the section. It is wide enough to cover the case of refreshment furnished to a single voter where it is given in connection with or because of his vote. The Legislature has no where declared that treating *per se*, as a matter of so-called good-fellowship or friendship, shall be a corrupt or illegal act, further than as it may be so provided by the 151st section, when it occurs at meetings of electors for the purpose of promoting the election, or under the 157th section, which prohibits the sale or gift of liquor at taverns and shops, &c., on polling days.

What has been proved in the case before us was, as I have already said, an act innocent in itself, and quite unconnected with the election, and therefore, in my judgment, not within the 153rd section.

We have been referred to the decision of my Brother Patterson in the *West Simcoe Case* as an authority in support of the present petitioner's contention. I do not so regard it, as it seems on the facts to be entirely distinguishable from the case we are dealing with, the corrupt practice there relied on being more like the practice Willes, J., describes in the *Bodmin Case* already referred to.

Charges numbers 77, 78, 79, 91, and 98 were disposed of at the trial, or treated as disposed of, against the petitioner, though I think we gave no formal judgment upon them. I may add that if we had found the charges proved which we have dealt with in our judgment to-day, we should nevertheless, in view of the nature of these charges and of the majority by which the respondent was elected, have felt bound to uphold the election under section 159.

The result is that the petition is dismissed.

The respondent is entitled to his costs.

From these judgments an appeal was had to the Court of Appeal, and was argued on January 10, 1884, before Spragge, C. J. O., Burton and Patterson, J.J.A., and Cameron, J.

S. H. Blake, Q. C., and *Johnston*, for the appeal.

H. Cameron, Q. C., and *G. T. Blackstock*, contra.

January 19, 1884. BURTON, J. A.—The only three charges which were argued upon this appeal were the charges No. 48 in the particulars, of bribing James Taylor, by the payment of \$2 by one Lowry, alleged to be an agent; charge of treating by John Storms, an agent; and the payment of and treating by paid canvassers.

One of the learned Judges, in disposing of the first of these charges, was evidently under the impression that the act was committed by Lowry treacherously, with the

view of injuring the respondent in his election, and one cannot say that there was no evidence to support that view, as he had not very long previously threatened to be even with the respondent, in consequence of his taking part against him in a municipal election. In that view the respondent would of course not be liable for his acts; but I think the evidence fails to establish agency.

The mere fact that Lowry was *ex officio*, as a municipal councillor, entitled to be a member of the Conservative Association would not in itself, without evidence that he had availed himself of the privilege, constitute him a member, so as to render the respondent liable for his acts as a member of that association of whose services in the election the respondent had admittedly availed himself. Nor do I think that the evidence shows that the respondent had invited Lowry to do anything more than support him, which does not necessarily mean anything more than giving him his vote, which he refused to do, adding, "I promised to get even with you, and I am going to have an opportunity now."

Mr. Elliott, the secretary of the association, asked him to lay aside his personal differences with the respondent and support him, but he still declined; and he also refused to attend a meeting of the association, or to have anything to do with the election.

How he came to change his mind afterwards and canvass for the respondent is not made clear upon the evidence, and it is shown that the respondent was not aware of it. It would, in my opinion, be going to an unwarrantable length to hold the candidate responsible under these circumstances for his acts.

The second charge is, that John Storms, an agent of the respondent, gave spirituous liquor to a number of persons on polling day at the shop of one Lockwood, a blacksmith, near to the polling booth, and that such gift was a corrupt practice either under the 157th or the 152nd or 153rd section of the Act (R. S. O. ch. 10).

I understood Mr. Blake to contend that the omission of the words, "in which spirituous or fermented liquors or drinks are ordinarily sold," after the words hotel, tavern, or shop, in sec. 66 of the old Act, for which sec. 157 has been substituted, and the addition of the word "place" in that section, were clearly intended to extend the prohibition to any place within the polling subdivision, and in connection with the word "given" to prevent any disposition whatever of spirituous liquor on polling day.

If that was the intention of the Legislature, I think they have signally failed in expressing their meaning. And if our construction of sec. 66, in the *South Ontario Case*, Hodgins's E. C., was the correct one, *a fortiori* are we compelled so to hold under the present Act.

There was much room to doubt under the former law, whether the section might not be divided into two paragraphs, one requiring the tavern or shop-keeper to close his hotel or shop, the other applying to the sale or gift by any one, tavern-keepers or not, to any person within the municipality. We stated our reasons fully in that case for our inability to place that construction upon it. But the present enactment appears to me to remove all doubt upon that point, and to restrict the prohibition, in express terms, to any hotel, tavern, shop or other place within the limits of the polling subdivision, the word place, according to the ordinary rules of construction, being confined to a place *ejusdem generis*. The word "give" is to be found in both enactments, and was intended probably to prevent an evasion of the prohibition to sell.

If the Legislature intended, after the decision of this Court in the case referred to, to extend the prohibition, I think they would have used more apt words, or would have omitted all reference to any hotel, tavern, shop or other place, and prohibited the sale or gift generally in the polling subdivision; but if they had done so we should have expected to find a similar proviso to that contained in sec. 151.

I think, therefore, that the case is not within sec. 157, and that there is no evidence of its being a corrupt act under sec. 152, or that there was any connection between the furnishing the drink and the voting so as to bring the case within sec. 153.

The third ground of appeal is:

3. That the learned Judges should have found on the evidence that the payment of certain sums of money to John Storms, of the Township of Ernestown, John McKay, of the said township, and James Howard and R. Fowler, of Amherst Island, ostensibly to pay said persons to act as canvassers, or for having so acted, or for their expenses, were corrupt practices."

So far as this charge points to the money having been colourably paid for one purpose, but with the view of its being used for bribery or other corrupt purposes, there is no evidence to support it. If it is meant to charge that employing paid canvassers is a corrupt practice, I think the case is concluded by authority under the English Acts, and that if our Legislature had intended that our law should be interpreted otherwise than the words reproduced in our Act had been interpreted in England, they would doubtless have changed or added to the wording of the section, so as to convey their meaning. So far as any addition has been made it is favorable to the view that canvassers may legally be employed and paid.

On the whole, I am of opinion that the appeal fails, and should be dismissed, with costs.

SPRAGGE, C. J. O.—I agree with the judgment of my Brother Burton upon the several points which are brought before us upon this appeal.

As to the agency of Lowry I think it is immaterial whether his being a member of the municipal council, and an avowed conservative (assuming him to have been so) constituted him *ipso facto* a member of a nominating or executive committee, and so an agent of the conservative party, or not; because even supposing express assent on

his part not necessary, it was certainly competent to him to dissent, and the evidence shews that he did dissent very emphatically, when asked by the candidate himself, and when asked by Mr. Elliott the secretary of the conservative association.

It is said that he afterwards canvassed for the respondent, and a Mr. Bartells gives evidence of his having spoken "for him" as he puts it, not openly in any speech, but in conversation with electors. That of itself would not constitute him an agent, even if he had in good faith spoken to electors on behalf of the respondent, especially after what had passed. It is not proved that the respondent had after his repudiation of agency accepted him as his agent. Something is said of the respondent having expressed pleasure at Lowry having as he had been told, agreed to forego his private grievance, and give his support to the respondent, but this is not brought home to the respondent; and if it had been, it was not an act of a character to constitute him his agent.

He did commit one act which was an act of bribery, and if he were an agent of the respondent, the respondent would of course be fixed with responsibility for it, it would cost him his seat. I refer to the *pseudo* purchase for \$2 of a cat from the colored man Taylor.

His offer to Marshall Sheffel of a like sum if he would vote for the respondent, cannot be seriously urged as the offer of a bribe, and evidently was not so regarded by Sheffel himself. Sheffel was a pronounced member of the opposite party, and the offer was made aloud and laughingly across a public street; and it is evident that it was looked upon by him as an ill-timed jest if not an insult.

One of the learned Judges who tried the case, my brother Osler, entertained at least a suspicion that Lowry was playing false to the respondent. He says: "The acts of Mr. Lowry appear to me to be more in the nature of acts done for the purpose of getting even with Mr. Roe, as he expressed himself, than for the *bonâ fide* purpose of obtaining votes." The evidence impresses me with the idea that

my learned brother's suspicion is well founded. Mr. Justice Galt says nothing upon that point; he had, when the other *rota* Judge so expressed himself, given his own opinion that the agency of Lowry was not proved, so that we do not know that he took a different view as to the *bona fides* of the conduct of Lowry.

I cannot see that either of the *rota* Judges is wrong in the conclusion at which he has arrived as to the agency of Lowry, I incline to think that both are right, and they have certainly had better opportunities than we have of forming a correct conclusion as to the true character of what passed in relation to the alleged agency of Lowry. My Brother Osler must have felt a strong conviction that Lowry was acting *mala fide* when he said: "I say if under these circumstances a candidate can be fixed with the acts of such a person, then it is very difficult to see how a man can be a candidate at all, without being liable to be unseated by the acts of a personal enemy."

I think it very clear that the giving of liquor by John Storms to several persons at the blacksmith shop of Lockwood is not within either secs. 152 or 153. I so entirely agree with the judgment of my Brother Osler upon that point, given in the Court below, that I have nothing to add to it. The section chiefly relied upon before the *rota* Judges was the 153rd, but the section relied upon in the argument before us is the 157th.

The argument of Mr. Blake upon that section is succinctly stated in the judgment of my Brother Burton. It loses much of its force when we find in the Dominion Election Act, passed two years before, a provision in relation to the selling and giving of spirituous liquors on polling days in the very same terms (with only a verbal difference or two) as sec. 157 in our Provincial Act. My brother Patterson has been good enough to draw my attention to it. It is sec. 91 of 37 Vic. ch. 9.

It may well be that our Provincial Legislature thought it wise and expedient to bring our election law into harmony, so far as in its judgment it could properly be

done, with the election law of the Dominion. It might obviously lead to unintentional violations of the law involving in some cases the setting aside of elections, in others highly penal consequences, if the laws governing elections differed according to whether they were for the Dominion or the Provincial Legislatures.

Construing sec. 157 by itself and without reference to the enactment for which it was substituted, it must, I think receive the construction which my brother Burton places upon it, and the words "or other place" must be read as "other place where the forbidden liquor is ordinarily sold" upon the canon of construction which we have so frequently to apply in the construction of written instruments.

Mr. Maxwell, 1st ed., speaking of generic words following more specific words, and the former being confined to words *ejusdem generis*, says (p. 297): "But the general word which follows particular and specific words of the same nature as itself, takes its meaning from them, and is presumed to be restricted to the same *genus* as those words; or, in other words, as comprehending only things of the same kind as those designated by them; unless, of course, there be something to shew that a wider sense was intended," and Mr. Maxwell gives several instances which illustrate this canon of construction and its application. Refer to p. 298 *et seq.*

I will quote another passage from Mr. Maxwell (p. 308). "It was indeed once thought that in the 14 Geo. II. ch. 6, which made it a capital felony to steal sheep 'or other cattle' this last expression was 'much too loose' to include any other cattle than those already specified, viz., sheep; but (Mr. Maxwell adds) this extreme strictness of construction is attributed to the excessive severity of the law in question."

The section in question here is one of great severity if applied universally, and not limited to a class *ejusdem generis* with those enumerated. That class would comprise what are called restaurants, saloons, and lower down

in the scale "groggeries," and the like. The penalties for offences of this section are \$100 for every offence, and the offender is subject to imprisonment not exceeding six calendar months in default of payment of the fine. The penalty may be one of no more than just severity if limited to taverns and other places where spirituous liquors are ordinarily sold, while it would operate with excessive severity if applied outside of those classes, an additional reason I think for holding it to apply only to certain classes, and that without resorting to the somewhat questionable reason to which Mr. Maxwell says the decision upon 14 Geo. II. is attributed.

Upon the third point urged before us upon appeal, that the *rota* Judges should have found upon the evidence that the payment of certain moneys to Storms and others "ostensibly to pay to persons to act as canvassers or for having so acted, or for their expenses, were corrupt practices" I agree in the judgment of my Brother Burton.

In my opinion the appeal should be dismissed, with costs.

CAMERON, J.—The appeal in this case raises three questions for consideration and determination by this Court. First, whether on the evidence given at the trial one John Lowry was an agent of the respondent, so as to make the respondent responsible for a corrupt practice committed by him in paying one James Taylor two dollars for his vote. Second, whether John Storms, an agent of the respondent, was guilty of a corrupt practice in giving spirituous liquor at the blacksmith shop of one Lockwood within a polling sub-division of the riding, on polling day, during polling hours. Third, whether the payment of certain sums of money to John Storms, John McKay, James Howard, and R. Fowler, to act as canvassers for the respondent, by the respondent, was a corrupt practice.

As to the first question the learned Judges found that Lowry was guilty of bribery in paying to James Taylor, a coloured man, \$2, nominally for a black cat, but really

for his vote; but they found that Lowry was not an agent of the respondent. The agency of Lowry rested upon the following circumstances: There exists, and existed at the time of the respondent's becoming a candidate, an organization known as the Liberal Conservative Association for the county of Lennox. The respondent was nominated by what is called the nominating committee of the association, and, as he admitted in his evidence, he was the candidate of the association, and in his opinion its members were his agents. By the rules of the association all municipal councillors who are of the Conservative party are members of the association and of the nominating committee. Lowry was a member of the town council of Napanee at the time of the respondent's nomination by the nominating committee, but he was not present at the nomination of the respondent, nor at the annual meeting of the association in 1883, when the respondent's nomination was confirmed. Owing to a personal unfriendly feeling on his part to the respondent; he positively refused to attend such annual meeting of the association, or to support the respondent in any way. The evidence as to this was given by the respondent himself, and by G. M. Elliott, the secretary of the association. The latter swore "Mr. Lowry was not at the nominating committee at which Mr. Roe was nominated. I had communication with him on the subject of supporting Mr. Roe. In February last I had two or three times. The first time was immediately before or after the issue of the writs. I had some previous knowledge the writs were to be issued on a certain day, and it was after I got that knowledge, but before the meeting of the association. It must have been just before the first of February. I asked him to lay aside the old differences; said in all probability the contest would be a close one, not only in this constituency but throughout the country, and it was a time when all Conservatives should lay aside all personal differences and support the candidate; and he absolutely refused to have anything to do with Mr. Roe's candidature, or to support him in any way. At the same time I asked him

to attend the annual meeting of the association, and he refused to attend that, and would not have anything to do with it; he refused positively."

The respondent swore he supported Mr. Jamieson, an opponent of Lowry, at a municipal election, and the Conservative party also supported Jamieson, and further said, "I had a conversation with Lowry about the part I took. He told me he would remember me and 'get even with me for it sometime.' That was in March, 1882. He was not present at the meeting of the nominating committee when I was nominated in August, 1882. * * I had a conversation with him after I was nominated, I think about a month after, perhaps sometime in September or October, he told me he would not support me. I think he said at the time, I promised to get even with you, and I am going to have an opportunity now. I was not aware until after the election that he did vote for me, and I think that some of my friends, I cannot tell who it was said they thought Lowry had voted for me. That was all the conversation I had with him about my election. If he did support me I could not tell how he came to do so."

On this evidence, uncontradicted as it was, it seems to me it would be carrying the principle of agency further than it has yet been done to hold that, in the face of his refusal to exercise his right, the mere fact of Lowry's having, by reason of his position as town councillor, a right to take an active part as a member of the nomination committee, without doing anything in assertion of the right till the eve of the election, would make him an agent for whose unlawful acts the respondent must bear the responsibility. The acts that he did do, as far as shown by the evidence, consisted in his bribing of Taylor already mentioned, and an offer to pay one James Warner for his day if he would vote for the respondent, and a further bantering enquiry of one Sheffel, whether he would take two dollars and vote for Roe; and a witness, one Murney Bartells, an apparent supporter of the respondent, said he once saw Lowry at a committee meeting, but did not see him taking

any part in the proceedings, and he could not say how long he remained at the meeting. These acts done after his refusal to support the respondent and to attend the annual meeting of the association, without its appearing that the respondent was aware of any change in his feelings of hostility, if they had changed towards him, are not such as would establish agency even assuming that they were done for the express purpose of aiding the respondent and there was no room for suspecting or questioning his *bona fides*.

The evidence of agency is infinitely weaker than it was in many adjudged cases in which it has been held to be insufficient to establish agency. See *North Victoria Case*, Hodgins, E. C. 671, where many of the authorities on the question of agency at elections are reviewed by the present Chief Justice of the Common Pleas, whose judgment was affirmed by the Court of Queen's Bench, 37 U. C. R. 234. I entertain a very strong opinion that where a candidate is brought into the field by a recognised association or organization of a political party, the members of such association must be regarded, if nothing takes place to show a repudiation by themselves or the candidate of their agency, as the latter's agents if they assume to act in his interest, and it would not be in the public interest to allow a candidate to avail himself of the result of their services without also assuming the responsibility of their acts, in so far as his seat may be affected thereby. Otherwise, while in fact relying upon the assistance of the organization, the candidate might escape the consequences of corrupt acts committed by its members by refraining from directly recognizing the individuals of the organization as his agents. It cannot be said that injustice can thereby be done to any interest concerned, though it may render necessary a new election. The opponent of the candidate who has had the benefit of such agency will not be prejudiced by a new election. The candidate has no right, if he owes his election to the exertions, corrupt and otherwise, of the association, to complain that he is com-

pelled to assume the consequences of those exertions of all kinds, as well injurious as beneficial, and the association certainly has no right to enjoy a triumph acquired through the corrupt agency of any of its members, while the general public are deeply interested in having elections conducted in a manner absolutely free from the taint of any kind of corrupt practice.

But it is a very different thing to hold that one who is personally hostile to the candidate, and repudiates both the candidate and the association as far as the election is concerned, and who at the last moment, without notice to the candidate of his intention, assumes to change his mind, and then commits a corrupt practice, is the agent of the candidate for whose acts the candidate must be deemed responsible. In such a case he cannot be held to have any closer connection with the candidate or the association than any individual supporter would have, and in that case there must be acts or conduct on the part of the candidate from which a recognition or acceptance on his part of the assistance of the supporter may reasonably be inferred. I think in the present case there is much room to conclude that Lowry was not in fact desirous of securing the election of the respondent, but was providing a means by which he might be unseated if successful, and thus get even with him, in accordance with his threat or declaration to that effect. But I prefer to base my opinion on the ground that, if acting *bonâ fide*, he was not an agent of the respondent, rather than to assume, without having heard any explanation from himself, that he was acting a disgraceful and treacherous part, not only to the respondent, but to the party with which he had been politically connected, while committing the corrupt and prohibited acts. I have not overlooked the fact appearing in the respondent's own evidence, that he asked Lowry to support him. That without being acquiesced in would not constitute the latter an agent, but coupled with his membership of the conservative association it would, the respondent being the candidate of the association, were it not for his refusal to give that

support. This ground of appeal is therefore not entitled to prevail.

As to the second ground of appeal, the evidence fully supports the finding of the learned Judges, that the treating complained of was not corrupt or a violation of either section 152 or 153 of the Ontario Election Act (R. S. O. c. 10). The liquor was given to any one apparently without reference to whether he had voted or was about to vote, or to induce him to vote or refrain from voting. It was given by Storms at the blacksmith's shop of one Lockwood, a political opponent, who himself had a flask, and treated persons coming to his shop to warm themselves, the day being cold, and there being no place of resort in the vicinity, without any reference to the election, but as a friendly social act. In the same spirit was the liquor of Storms dealt with. The treating being open and in the presence of political opponents, without the slightest reference to the way in which the parties drinking were going to vote or had voted, it would seem impossible to regard the act as a violation of section 152, and I think it equally impossible to hold that it was an act prohibited by section 153. The words in that section, "on account of the voter being about to vote or having voted" must have some significance, and I agree with the opinion expressed by Mr. Justice Osler that the giving of meat, drink, or refreshment, to be a corrupt practice under that section, it must be given in reference to and in connection in some way with the voting of the party treated. The mere fact that the party has come to the neighbourhood of the place where the treat is given for the purpose of voting, or just after having voted, will not make the act of treating, without more appearing, a giving of drink on account of the voter being about to vote, or on account of his having voted.

To violate clause 152 the treating must amount to bribery.

To violate section 153 the act need not have any of the essentials of bribery. But it must in some way be connected with the voting—that is, the voter must in some

way be led to expect that he would receive such refreshment if he went to the poll, though not with the view of influencing him as to the way in which he should vote, or it must be given as some acknowledgment of the fact of his having voted, and because of his having voted. It is to be observed any kind of drink or refreshment is prohibited by section 153, and not merely the giving of spirituous liquors.

It was as a violation of one or other of these clauses that Storms's act was presented at the trial; but on the argument of the appeal it was contended that if it was not a corrupt practice under one or both of these clauses, it was so under section 157; and were it not that the operation of that clause would seem by authority to be confined to the sale or giving of spirituous liquors in a place where the same is usually lawfully sold, I should have very great difficulty in holding that the act complained of was not a corrupt practice committed by an agent of the respondent.

I am of opinion, however, that the judgment of this Court as it was then constituted in the *South Ontario Case*, Hodgins, E. C. 420, is conclusive upon the question, as on principle it is not to be distinguished from the present case. The Court was not unanimous in its judgment, as that very distinguished Judge, Chief Justice Draper, dissented. It was there held that section 66 of the Election law of 1868, 32 Vict. ch. 21 (O), as amended by 36 Vict. ch. 2, only related to and imposed a penalty on the keepers of hotels, taverns, or shops where liquors are ordinarily sold. The language of that clause was as follows: "Every hotel, tavern, and shop in which spirituous or fermented liquors or drinks are ordinarily sold, shall be closed during the day appointed for polling in the wards or municipalities in which the polls are held; and no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period, under a penalty of one hundred dollars in every case."

The existing provision is as follows: "No spirituous or fermented liquor or strong drink shall be sold or given at any hotel, tavern, shop, or other place within the limits of a polling sub-division, during the polling day therein or any part thereof, under a penalty of one hundred dollars for every offence; and the offender shall be subject to imprisonment not exceeding six months at the discretion of the Judge or Court, in default of payment of such fine."

The words in section 157 (R. S. O. ch. 10) "at any hotel, &c.," confine the application of the clause to a sale or giving within the hotel, &c., as much as the provision in section 66 of the Act of 1868, requiring hotels, &c., to be closed. And it is only the addition of the words in clause 157 after the word "shops" of the words "or other places," and the omission of the words "ordinarily sold," that can possibly be held to make any distinction. This amendment of the law took place on the 10th February, 1876.

The *South Ontario Case* was tried at Whitby, on the 13th May, 1875, and the judgment of the Court of Appeal was delivered on the 22nd January, 1876.

Chief Justice Draper, in the delivery of his dissenting judgment—he having expressed the opinion that while the first part of the clause 66 in the Act of 1868 applied only to the keepers of the places named, the latter part applied to any person selling or giving liquor to another in a tavern, &c.,—after referring to the opinion of the other members of the Court, expressed the hope that the Legislature would remove the doubts by a clear statement. The bill, a reference to the journals of the Legislative Assembly shows, was in committee of the House, and read a third time on the 8th day of February following. It is therefore probable that the Honorable the Attorney General, who had charge of the bill, was then aware of the difference of opinion among the members of the Court of Appeal and made clause 157, then clause 3 of ch. 10, 39 Vic. O. to assume its present shape, with a view to remove the doubts that had arisen, as was suggested by Chief Justice Draper.

But, as was pointed out to me by my Brother Patterson, clause 157 is identical with clause 91 of the Dominion Election Act of 1874, 37 Vic. ch. 9 (D.), so the difference of opinion as to the correct interpretation of clause 66 among the members of this Court may not have influenced the Legislature in the adoption of the clause as it now stands; at all events, it has not accomplished that object. My Brother Patterson, in the *Lincoln Case*, Hodgins, E. C. 500, came to the conclusion that the addition of the words, "or other places," made no difference in the effect of the clause, which must still be confined in its operation to the prohibited acts of selling or giving within a place of the same character as a tavern, hotel, or shop where liquors are permitted to be sold.

The words hotel, tavern, or shop, would not in terms cover all the places in which liquors are licensed to be sold; as, for instance, a saloon. And if originally the provision, as it has been decided, was confined to the places named in clause 66 of the Act of 1868, the words "other places" may well be confined in their operation to places of a like nature, as hotel, tavern, or shop.

I confess, however, if there had been no decision on the point, I should not have been able to come to the conclusion that the Legislature intended to limit the operation of clause 91 of the Dominion Election Act, or 157 of the Ontario Act to places licensed to sell liquors, or where liquors are ordinarily sold. The substitution of the words "other places" in these clauses, for the words "ordinarily sold" in clause 66 of the Act of 1868 would seem to repel the idea that the intention to so limit existed. The object of the enactment originally, as signified by the heading under which it appeared, was to secure the observance of peace and good order at elections during the polling day, and it is too plain to admit of controversy that if spirituous liquors formed an element of disturbance and disorder, they would be equally potent whether drank at a tavern or private house. I should, therefore, in the absence of authority, have attached to the clause the meaning that

would be given to it by a layman ignorant of any principle of construction which confines general words following special words in their operation to things *ejusdem generis*, or of like character with the things specially indicated.

Tavern, hotel, or shop, by themselves, have no necessary connection with the licensed sale of strong drinks. Taverns existed before licenses for the sale of liquors. Shop, dissociated from the words where strong drinks are ordinarily sold, has no necessary connection with the sale of liquor.

The definition of a shop, as given in the Imperial Dictionary, is "A building or apartment in which goods, wares, drugs, &c., are sold by retail. 2. A building in which mechanics work, and where are kept their manufactures for sale," which definition would include a blacksmith's shop.

To my mind the Legislature intended during the day of polling to totally prohibit the sale or giving away within the electoral district of spirituous liquors or strong drinks, and that the inconvenience that might be thereby caused to some private individuals was considered of less importance, in a public point of view, than the prevention of disorder and disturbance that might flow from the permitting liquor to be used within the polling sub-division.

To these observations I will only add in considering the question it should be borne in mind that the Legislature has made the use of liquor in four distinct cases a corrupt practice. First, when it is given at any time to induce an elector to vote or to refrain from voting. Second, when it is given to a voter on nomination or polling day, any where, on account of his being about to vote or having voted. Third, furnishing it to a meeting of electors assembled to promote the election at any time or any place except at the usual place of residence of the candidate or person furnishing it; and fourthly, selling or giving it within a polling subdivision on polling day, contrary to sec. 157. All the provisions except the last extend to any kind of drink or refreshment, and to any place, while the last

alone is restricted to strong drink, and applies to the selling or giving the liquor to a non voter as well as voter, and so to persons unconnected with the election as well as to those taking part therein, which I think furnishes a strong additional argument in favor of the view the clause is not confined in its operation to hotels, taverns or shops, or other places *ejusdem generis*, but amounts to a general prohibition as to giving or selling strong drinks on the polling day within the subdivision district. The opinion of the present Chief Justice of Ontario in the *South Essex Case*, Hodgins, E. C. 235, of Chief Justice Draper in the *South Ontario Case*, Hodgins, E. C. 439, of the Chief Justice of the Queen's Bench Division in the *North Wentworth Case*, Hodgins, E. C. 352, and of the Chief Justice of the Common Pleas Division in the *South Ontario Case*, Hodgins, E. C. 434, may be usefully considered in connection with this question.

But for the reason already stated I do not dissent from the opinion expressed by the other members of the Court.

The third ground of appeal presents the question as to whether the payment of canvassers *per se*, without any intent to bribe or influence the canvasser, or to enable him to bribe others, is a corrupt practice under section 149 of the Ontario Election Act.

The learned Judges at the trial held it was not. My Brother Armour in the *North Ontario Case*, Hodgins, E. C. 785, held that it was. In this view he was sustained by Gwynne and Tachereau, JJ., on appeal to the Supreme Court (a), but the majority of the Court, consisting of Sir Wm. J. Ritchie, C. J., Fournier and Henry, JJ., took a different view, and the weight of English authority under a similar provision of the Imperial Election Act is in favour of the view held by the learned Judges at the trial of this case. I confess I think the language of section 149, sub-sec. (c) does in terms extend to and cover a case like the present, and prevents the payment of money to canvassers, but as there was no corrupt intent in the present case, I

(a) *Wheeler v. Gibbs*, 4 S. C. 430.

have more satisfaction in finding a different construction has been put upon the clause by the Supreme Court and English Judges, than that given to it by my Brother Armour, whose opinion expressed, in his usual forcible and clear style, would commend itself to me as sound and convincing. I can see no distinction between the employment of an orator or public speaker, so called, and a canvasser, and therefore am unable to distinguish the *North Ontario Case* from the present.

Upon the whole case I am of opinion the appeal should be dismissed, with costs.

PATTERSON, J. A., concurred.

G. A. B.

SOUTH RENFREW.

PROVINCIAL ELECTION.

BEFORE MR. JUSTICE BURTON AND MR. JUSTICE GALT.

PEMBROKE, 20th August, 1884.

JOHN HARVEY, *Petitioner*, v. JOHN FRANCIS DOWLING,
Respondent.*Election Act, R. S. O. ch. 10, ss. 154, 161, 162—Controverted Elections Act, R. S. O. ch. 11, O., s. 2, sub-s 6, s. 38—Corrupt act—Illegal act—Payment of voters travelling expenses—Concurrent finding—Disqualification—Removal of—Retrospective Act—47 Vic. c. 4, s. 48, O.*

At a Provincial election trial before CAMERON, J., and BOYD, C., CAMERON, J., certified that they differed in their judgments as to whether the respondent was guilty of a corrupt practice under section 161 of the Election Act, R. S. O. ch. 10, in paying or consenting to the payment of the travelling expenses of certain voters to convey them to the poll ; and he further certified that the said respondent was proved guilty of the said corrupt practice.—BOYD, C., also certified as to the difference of opinion ; and further certified that the said respondent committed an illegal act under sec. 154 in sanctioning the payment of voters travelling expenses at such election ; but without any corrupt intent, and in ignorance which was involuntary and excusable, under a belief that so long as he did not personally bear or pay the said expenses, it was not illegal ; and under the fullest belief that the said voters were bound or were willing to repay the said expenses, or allow them to be deducted from their wages.

Held, that under the Act in question, R. S. O. ch. 11, the Judges must concur in finding that the respondent had been guilty of a "corrupt practice" ; and that there was such concurrent finding here ; for although the finding of BOYD, C., was that the act was an "illegal act," such illegal act under sec. 2, sub-s. 6, is made a corrupt act ; and that the respondent was therefore disqualified ; and that as there was not a concurrent finding under section 162, such disqualification was not removed ; and that this was not affected by the Act 47 Vic. ch. 4, sec. 48 O., as in this respect that Act was not retrospective.

THE petitioner in this case was an elector, and prayed that the return of the defendant might be set aside, and that Patrick Devine might be declared entitled to the seat, on the ground the respondent was personally disqualified

as a candidate, and in consequence the votes given for him were virtually thrown away.

The petition also charged corrupt practices at the election ; but nothing was said at the trial on this branch of the case, and no evidence was given on it.

It was proved or admitted that an election for the electoral district of the south riding of the county was held on 20th and 27th days of February, 1883, at which the said John Francis Dowling and the said Patrick Devine were candidates, and that the returning officer returned the said John Francis Dowling as duly elected. It was also proved or admitted that a petition had been presented complaining that the said John Francis Dowling had, by himself and his agents been guilty of corrupt practices at such last mentioned election. The case was tried before Boyd, C., and Cameron, J., now Chief Justice of the Common Pleas, by whom the election was declared void, and a new election was directed to be held. The findings of Boyd, C., and Cameron, J., so far as material, are set out in the judgment of Galt, J. Such election (which was the subject of this trial) took place on 11th and 18th days of January, 1884.

At the nomination a protest in the following terms was handed to the returning officer :

“ To Andrew Irving, Esquire, returning officer, appointed to hold an election for the return of a member to represent the electoral district of the south riding of the county of Renfrew, in the legislative assembly of the Province of Ontario, and to the electors of the said electoral division.

“ I, Patrick Devine, of the village of Renfrew, in the county of Renfrew, merchant, duly nominated as a candidate at said election for the representation of the the said riding in the said assembly, do hereby give you and each and every of you notice that John Francis Dowling, of Eganville, in the said county, Physician, who has been proposed on this eleventh day of January, 1884, the nomination day, as a candidate at the said election, and who claims to be a candidate and seeks to be elected at this election to represent the said riding in the said assembly, is not duly qualified to be a candidate at the said election, and this by

the judgments of Chancellor Boyd and Mr. Justice Cameron rendered in a certain election petition filed in the Court of Appeal for Ontario under the Controverted Election Act of Ontario, wherein John Harvey was and is the petitioner, and the said John Francis Dowling was and is the respondent, the said John Francis Dowling was found guilty of corrupt practices within the meaning of the Election Act of Ontario, and his election was set aside, and he, the said John Francis Dowling thereby became, and was, and is disqualified from being a candidate at this election, and is incapable of being elected to and sitting in the said assembly. And I hereby notify you, the said returning officer that I am the only duly qualified candidate nominated at this election, and that I should be declared elected by acclamation, and I give you and the said electors of the said riding notice of the above facts, and I further notify you the said electors not to cast a vote or mark a ballot at this election for the said John Francis Dowling, as all such votes or ballots shall be lost, thrown away, and null and void. That I do and shall claim to be duly elected at this election to the said assembly as being the only duly qualified candidate nominated and standing for said election. And we the undersigned electors of the said riding, do hereby also notify you the said returning officer and electors of the said riding, of the above facts and claim that the said Patrick Devine should be declared elected at this election, as being the only qualified candidate nominated and standing.

Dated at Renfrew, this eleventh day of January, A. D. 1884

“PATRICK DEVINE,
“*Candidate.*

“J. A. MACDONALD,
“A. J. MORROW,
“T. MCRAE,
“*Electors.*”

Notwithstanding this protest the voting was proceeded with, and the returning officer declared the respondent duly elected. This petition was then filed.

A. R. Creelman and D. O'Connor, for the petitioner.
Bethune, Q.C., for the respondent.

September, 12, 1884. BURTON, J. A.—All the other charges of corrupt practices were abandoned at the hearing with the exception of one charging a violation by the respondent of section 154 of the Election Act, R. S. O. ch. 10, alleged to have been so found by the Judges who avoided the previous election of the respondent.

As to this, it was urged by the petitioner, that as the respondent had been found guilty of a corrupt practice by a report in which both of the Judges concurred, he was *ipso facto* disqualified, and as only one of them was of opinion that the case was brought within section 162 so as to relieve him of the penalties and disabilities which attached to their finding under section 161, he was at the time of the last election incapable of being elected to the Legislative Assembly, and must, unless relieved by the recent legislation, be held to have been disqualified, and the election must consequently be avoided.

Mr. Bethune, on the part of the respondent, contended that the intention of the Legislature was that there should be but one joint report, that it was one Judicial act, in which there can be no disagreement, and although perhaps he could not go so far as to contend that the report must be upon one piece of paper, still the reports must be in *ipsissima verba*, or at least the same in substance, and he referred us to a case of *Grant v. Overseers of Paghham*, 3 C. P. D. 80, and intimated that the learned Chancellor had, upon the authority of that case, designedly altered the wording of the report when presented to him in order, if possible, to prevent the serious consequences of finding the candidate personally guilty of a corrupt practice, where the act was committed without any corrupt intent, and under the belief that it was not illegal.'

I think that case is clearly distinguishable from the present. By the law under which that case was decided, it was provided almost in the words of our own statute that the Judges should determine whether the members whose election or return is complained of, or any and what other person was duly returned or elected, or whether

such election was void, and shall forthwith certify in writing such determination to the Speaker ; and where corrupt practices are charged he is also, in addition to such certificate, and at the same time to report in writing whether any corrupt practice was or was not proved to have been committed with the knowledge and consent of any and which candidate at such election, and the nature of such corrupt practice.

So far our own and the English Act are alike, but we now come to a very material divergence. Our Act provides that " When it is found by the report of the Judges

* * that any corrupt practice has been committed by or with the actual knowledge or consent of any candidate at an election in addition to his election * * being void," he shall be disqualified.

The English Act 31-32 Vic. ch. 125, sec. 43, is very different. It is: " Where it is found by the report of the Judge * * that bribery has been committed by or with the knowledge and consent of any candidate at an election, such candidate shall be deemed to have been personally guilty of bribery at such election, and his election, if he has been elected, shall be void and he shall be incapable of being elected" to Parliament during a period of seven years.

The learned Judge in that case did not report that the candidate had been guilty of bribery, nor did he report that a corrupt practice had been committed with the knowledge and consent of the candidate, but merely that he was guilty of a corrupt practice within the true intent and meaning of the Corrupt Practices Act of 1854. The words used in the report did not necessarily imply personal bribery, or bribery by his agents with his knowledge and consent. There is great good sense in the remarks of Mr. Justice Grove, at p. 87, that " Where you have to construe a penal Act, you ought to see that the offence, in respect of which you are to bring home the penalty against the person alleged to have incurred it, is proved to come clearly within that which the Act contemplates as being the offence."

The learned Judges there held that upon the face of this report it was consistent with it, that the candidate was guilty of a corrupt practice, but not guilty of a corrupt practice personally or committed with his own knowledge and consent, and the Judge not having in his report in terms either express or which were equivalent to express language found that bribery had been committed, they could not hold the party disqualified. Mr. Justice Lindley remarking at p. 91, "Although I think no particular words are necessary, still the report to disqualify, must be, I think, so clear and precise as to admit of no doubt or difference of opinion as to its meaning or legal effect."

But how is it (in this present case.) Neither of the learned Judges are strictly accurate in their reference to the section 161. The Chief Justice of the Common Pleas finds that the respondent was guilty of a corrupt practice under section 161 in paying or consenting to the payment of the travelling expenses of certain voters to convey them to the polls. Section 161 does not in fact, create any offence. What the learned Judge meant evidently to refer to, was a violation of section 154, but no reference is made in his report to that section. The learned Chancellor certifies that the Judges differed in their judgment as to whether he was guilty of a corrupt practice under section 161 of the Election Act, which as I have already pointed out, does not refer to any corrupt practices of which the Judges can adjudge the party guilty, but simply provides that when it is found by the report of the Judges upon an election petition that any corrupt practice has been committed by or with the actual knowledge and consent of any candidate, disqualification shall follow. But he proceeds: "And I further certify, that the said respondent committed an illegal act under section 154 in sanctioning the payment of voters' travelling expenses at such election." Adding, "but without any corrupt intent and in ignorance which was involuntary and excusable under a belief that so long as he did not personally bear or pay the said expenses it was not illegal; and under the further belief that

the said voters were bound or were willing to repay the said expenses or allow them to be deducted from their wages." And then he adds a certificate of the further fact necessary to relieve the candidate of the disabilities incurred on being proved guilty personally of a corrupt practice, viz., that he had honestly desired and in good faith endeavoured to have the election conducted according to law.

In the light of what was mentioned by Mr. Bethune as to the alteration of the report by the Chancellor, we may perhaps assume that what the learned Judge intended to convey was that they differed as to the effect of sec. 161 upon their report.

The report itself is required by sec. 58 of the Controverted Elections Act, and points out what the Judges are called upon to report. The learned Chancellor says in effect: "I hesitate to stigmatize as a corrupt practice an act done under the circumstances stated in my report. I therefore report the facts with the extenuating circumstances; if in law that does constitute a corrupt practice, be it so, but I desire the respondent to have the benefit of any doubt upon the point, as I cannot bring myself to stigmatize it as a corrupt practice." And that, as I understood it, was the effect of Mr. Bethune's contention: that the Judges have not concurred in finding a corrupt practice in so many words, and that being so, disqualification did not follow; but still I think we are bound to enquire, although the reports are not in the precise words of the Act of Parliament, whether they do contain words which unambiguously and necessarily involve a joint finding of the Judges of an act by the respondent, which in law *constitutes a corrupt practice*. Mr. Justice Cameron, as I have already pointed out, makes no reference to sec. 154, but he does find expressly that the respondent was proved guilty of a corrupt practice, to wit, in paying, or consenting to the payment of the travelling expenses of certain voters to convey them to the polls. The section in question provides *inter alia*, that the payment by any candidate, or by any person on his behalf, of

the travelling and other expenses of any voter in going to or returning from the election shall be illegal acts, and under the interpretation clause any violation of the section is declared to be a corrupt practice. If, therefore, both the Judges had signed this report, even without the express declaration to be found that he was guilty of a corrupt practice, I think it clear that as a consequence the respondent would have been disqualified. The learned Chancellor whilst declaring that he differs from the Chief Justice in finding the respondent guilty of a corrupt practice under sec. 161, does find that he committed an illegal act under sec. 154 in sanctioning the payment of voters' travelling expenses at such election. It is therefore found by both reports that an illegal act was committed, and with the knowledge and consent of the respondent. They are both referring to the same act, and they both agree as to its illegality. That illegal act was the payment, or sanctioning the payment of expenses prohibited by sec. 154, and was therefore without any corrupt intent in law a corrupt practice, and being found to have been committed with the knowledge and consent of the respondent, he necessarily became, in my opinion, disqualified under sec. 161, and could not be relieved from such disqualification unless the Judges concurred in relieving him under sec. 162.

I can scarcely conceive a stronger case for applying that section upon the facts found by the Chancellor. Here is an ambiguously worded section declaring certain acts to be illegal acts and the party affected only becomes aware of its being a corrupt act by groping among the interpretation clauses. He is found to have honestly desired and endeavoured in good faith to have the election conducted according to law, and under the belief that the payments were merely advances to the men on account of their wages. It is quite possible that a *bonâ fide* advance of the men's wages, even though it were known that the money was to be used in paying their travelling expenses, would not come within the Act, and it is fair to assume that if that had been established the learned Chancellor would

not have found an illegal act committed, but that was not apparently shewn; and I think it clear that if I am correct in holding that the act itself is found by the two Judges, both holding it to be illegal, it was absolutely necessary to get their joint concurrence before the respondent could invoke the relief afforded under section 162.

I am of opinion, therefore, that when the respondent offered himself for re-election he was disqualified, and that the present election must be set aside unless it has been validated by recent legislation.

That legislation is to be found in section 48 of the Act of the last session. I must confess that the meaning of the section is not so clear as one would expect to find it in an Act for which a retrospective operation is claimed. It reads thus: "To remove doubts, it is hereby declared that it has been, and is, the policy of the election law, and the intention and meaning of the several statutes in that behalf, that no election was or is void for any irregularity on the part of the returning officer, unless it appears to the tribunal having cognizance of the question that the irregularity affected the result of the election." It is not necessary to say whether this effects any change in the law, but there is no doubt that the language embraces past as well as future elections. It then proceeds: "and that no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice or alleged corrupt practice without the concurrent judgment to that effect of the two Judges by whom the election petition is tried."

I find it very difficult indeed to place a construction upon this portion of the section. It is quite clear that under the election law, as it stood previously, the Judges had nothing to do with adjudging a party disqualified, all that they did or could do was to find whether the party charged was or was not guilty of a corrupt practice. If the Judges united in finding him guilty of a corrupt practice the disqualification followed as a legal consequence. The section must, except upon the hypothesis I shall pre-

sently refer to, have been penned by some one who was unaware of the existing state of the laws and supposed that the power to declare a person disqualified or subject to a penalty rested with the Judges, whereas the law merely enabled the Judges, in the event of disqualification, if certain facts were established to their satisfaction, to relieve the parties from the disabilities.

There is one possible case to which it might apply, viz., if a party had been guilty of a corrupt practice before the passing of the Act of Parliament but the trial of the petition in which it was alleged did not come off till after its passage, I incline to think that in such case it would have been necessary under the Act for the Judges to find not only that the corrupt practice had been committed with the knowledge and consent of the candidate, but that they should also find, contrary to the previous law, that the party charged with the corrupt practice was disqualified or subject to disability or penalty. That does not apply to the present case when the respondent was not only charged with corrupt practice, but had been adjudged guilty of it before the passing of the Act. when it would have been *ultra vires* for them to adjudge him disqualified or subject to penalty.

I feel even more difficulty in placing any intelligible meaning on the passage immediately following that I have quoted, which reads thus: "That this applies to section 162 of the Election Act, and the conditions and circumstances therein mentioned as well as to other matters on which corrupt practices or the consequences thereof in any way depend." What is meant by the words "that this applies?" Section 162 enables the Judges, as I have said under certain conditions and circumstances to relieve the party charged from the disability and penalties he has incurred, if it is meant that in granting such relief there must be the concurrent judgment of the Judges, that as I understand it always has been the law.

The remaining portion of the section is clearly prospective, but were it otherwise it would not, in my opinion,

assist the respondent, inasmuch as the practices relied on at the former election as corrupt practices were set up and proved at the former trial, and so adjudged as by law to involve disqualification, although the Judges did not concur in relieving the respondent from the consequences. I think we are therefore compelled to hold the election void, and to set it aside, with costs.

Upon the question of awarding the seat to his opponent, I think this is not a case even if notice of the respondent's disqualification were brought home to the voters much more clearly than it has been in which we could give effect to it. I adopt the language of the Clitheroe Committee, which was cited with approval by Lord Coleridge in the *Launceston Case*, that to give effect to the notice, the disqualification must be founded on some positive and definite fact existing and established at the time of the polling, so as to lead to the fair inference of wilful perverseness "on the part of the electors voting for the disqualified person."

The effect of our decision is, that the respondent was disqualified and incapacitated from being a candidate.

There is, I suppose, no doubt that if the voter has knowledge of certain facts, and they by law render the candidate incapable of being elected, then if the voter with such knowledge chooses to vote for that candidate he throws away his vote, and it is the same as if he had not voted. It would be no answer in such a case to say that he was ignorant of the law. So, also, probably where notice is given of facts such as would put a person of ordinary care and intelligence on enquiry, and if he exercised ordinary diligence and intelligence on such enquiry it would lead him to the conclusion that the facts did exist which would in law incapacitate the candidate, then he cannot absolve himself by asserting want of knowledge either of the facts or of the law, but it would be pushing such a doctrine to an extreme length to apply it to a case like the present when the disqualification depended upon a question upon which the Judges deciding the facts were in doubt, and

three eminent counsel had given an opinion adverse to the view that the respondent was disqualified, but I am relieved from deciding the question on that ground, as although I find that the notice was very generally circulated in certain localities, it still leaves a doubt upon my mind, a doubt which, under the ballot system, it may be impossible to solve, to what extent that knowledge was brought home to the voters.

I am, therefore, of opinion that we cannot award the seat to the other candidate, but must confine ourselves to declaring the election void: that no corrupt practices at this election were proved: and that there is no reason to believe that corrupt practices have extensively prevailed at the election to which the petition relates.

GALT, J.—The learned Judges before whom the first election was tried although they agree as to avoiding the election, differed in their finding as to the conduct of the respondent in this. Cameron, J., found as follows: “And in further pursuance of the said Act, I certify, that we, the said Judges differed in our judgments as to whether the said John Francis Dowling was guilty of a corrupt practice under section 161 of the Election Act in paying or consenting to the payment of the travelling expenses of certain voters to convey them to the poll, and I, the said Matthew Crooks Cameron, for myself, certify that the said John Francis Dowling was proved guilty of the said corrupt practice.”

The learned Chancellor reported: “And in further pursuance of the said Act, I certify, that we, the said Judges differed in our judgments as to whether the said candidate the respondent was guilty of a corrupt practice under section 161 of the Election Act. And I, the said John Alexander Boyd, for myself, certify that the said respondent committed an illegal act under section 154 in sanctioning the payment of voters’ travelling expenses at such election, but without any corrupt intent and in ignorance, which was involuntary and excusable, under a belief

that so long as he did not personally bear or pay the said expenses it was not illegal, and under the further belief that the said voters were bound or were willing to repay the said expenses or to allow them to be deducted from their wages."

There is some verbal inaccuracy in the reference to section 161 by both the learned Judges, and that what is intended is not whether the respondent is guilty of a corrupt practice under section 161, but whether the act of which both the learned Judges found him guilty would subject him to the penalties enacted by section 161, for section 161 itself contains no mention of any corrupt practices. It is as follows: "When it is found by the report of the Judges upon an election petition that any corrupt practice has been committed by or with the actual knowledge or consent of any candidate at an election," and that the next section does not apply, then "in addition to his election, if he has been elected, being void, he shall during the eight years next after the date of his being so found guilty, be incapable of being elected to and of sitting in the Legislative Assembly," &c.

The corrupt practice found by Cameron, J., and the illegal act under sec. 154 found by the Chancellor, were one and the same, namely, the payment of voters' travelling expenses.

By section 154 such an act is declared to be an "illegal act." It is not in terms declared to be a "corrupt act." But by the Controverted Elections Act, R. S. O. ch. 11, sec. 2, sub-sec. 6, any violation of the 154th section is declared to be a "corrupt act." It therefore follows, as it appears to me, that when the learned Chancellor found that the respondent "committed an illegal act under section 154, in sanctioning the payment of voters' travelling expenses at such election, but without any corrupt intent," he must be held to have found him guilty of a "corrupt act." An illegal act would not necessarily avoid his election, but a "corrupt act" would, and both the learned Judges concurred in holding that the election was void.

By section 38 of R. S. O. ch. 11 "Allegations of corrupt practices against a candidate or his agents shall be tried by two of the Judges on the *rota* sitting together, * * ; and no candidate shall be unseated for corrupt practice, nor shall any person be declared guilty of a corrupt practice except upon the decision of the two Judges jointly, or of the Court of Appeal."

By the foregoing it is expressly enacted that before a candidate can be unseated or be declared guilty of a corrupt practice the Judges must concur. In the present case there was one act in question before the learned Judges on which they did concur in unseating the candidate for his own act, and must therefore necessarily have concurred in finding him guilty of a corrupt practice, the latter part of the section refers to persons other than the candidate, although it clearly includes him also. Reference has been made to R. S. O. ch. 10, sec. 162, which at the time when the first trial took place (it has since been amended) was as follows: "If it appears to the Court or the Judges trying an election petition, that an act constituting in law a corrupt practice was committed by a candidate or with his knowledge and consent, but without any corrupt intent, and in an ignorance which was involuntary and excusable, and that the evidence shewed the candidate to have honestly desired, and in good faith endeavoured as far as he could, to have the election conducted according to law, the candidate shall not be subject to the penalties and disabilities which he would but for this section incur under the next preceding section."

This has since been amended, and, in my opinion, very properly, and if either of the Judges now entertains the opinion of the good faith of the candidate he shall be excused, but it was not so when the trial now in question took place; it was at that time necessary the Judges should agree.

It is plain from the finding of the learned Chancellor he thought the respondent entitled to be relieved under section 162, because he has reported in the very words

of the statute, but it necessarily follows he must have thought that, but for this section, he was liable to the penalty mentioned in the 161st section or it would have been unnecessary to frame his report as he did; and this also accounts for the difference of opinion of the learned Judges as to whether the respondent was guilty of a corrupt practice under section 161, that is to say, not as to whether he had been guilty of a corrupt practice, but whether having been so he was liable to the penalty therein enacted.

It was also contended by Mr. Bethune that under the terms of the statute, before a person could be disqualified, there must be a report of the two Judges, not a separate report by each.

By the Interpretation Act sec. 8, sub-sec. 23, words supporting the singular number or the masculine gender only shall include more persons, parties, or things of the same kind than one.

I can see no reason whatever why a different meaning should be attached to the word "report" in this case than would generally be given to it, nor why when the term "report of the Judges," is used it must necessarily follow that only one report can be made in place of each of the learned Judges making a separate report, it is true that before a disqualification can take place and a member be unseated the Judges must agree in their conclusion.

In the present case the learned Judges agreed that the election was void but they disagreed as to the conduct of the candidate entitling him to relief under section 162, the result of which was that the disqualification under section 161 existed.

If Mr. Bethune's argument is correct it was quite unnecessary to pass the amending Act.

It appears to me, however, to be entirely contrary to the then existing law, which I understand to be that both Judges should concur before a person should be found guilty of a corrupt practice, and that both Judges should concur before a candidate was relieved under the 162nd

section, and if there was a difference of opinion on the latter question the disqualification continued which was what took place in the present case.

In my opinion the respondent was, at the time of the second election, "incapable of being elected," and therefore that the election was void,

It was also urged by Mr. Bethune that if by an Act passed on 25th March, 1884, the respondent was relieved from the disqualification under which he laboured, if he was disqualified, that the Act was retrospective, and therefore that, although the election had taken place before the passing of the Act, he was then capable of being a candidate.

As this is a matter of great public importance, I will set out the section bearing on it at length. I shall, however, divide it into several parts.

Sec. 48—To remove doubts, it is hereby declared that it has been and is, the policy of the election law, and the intention and meaning of the several statutes in that behalf, that no election was or is void for any irregularity on the part of the returning officer, unless it appears to the tribunal having cognizance of the question that the irregularity effected the result of the election.

There is no doubt that the foregoing is retrospective and declares what the law was.

And it then proceeds: "And that no candidate or other person is disqualified or subject to any disability or penalty for any corrupt practice or alleged corrupt practice without the concurrent judgment to that effect of the two Judges by whom the election petition is tried."

This alters the law, because by sec. 38 of R. S. O. ch. 11 the Court of Appeal had the power to declare a candidate guilty of a corrupt practice, and the operation of this clause would appear to have withdrawn that power, and now nothing but the concurrent judgment of the two Judges by whom the election petition is tried will work a disqualification.

I think, however, it has this effect, that if on some occasion prior to the passing of the Act a trial had taken

place, and the Judges before whom the trial took place differed in opinion as to the candidate having been guilty, and that subsequently the Court of Appeal had found him guilty, he is for the future relieved from disqualification. The word being *is*, that is to say, that his status was, by the passing of the Act now in question, restored.

It could not be retrospective because up to that time he had been disqualified by the sentence of the Court of Appeal. That this applies to section 162 of the Election Act, and the conditions and circumstances therein mentioned, as well as to other matters in which corrupt practices or the consequences thereof in any way depend.

It is upon this clause Mr. Bethune contended the election could be upheld.

The preceding part of the section, as I have already pointed out, has no retrospective effect except so far as to reinstate the candidate, and the argument is much stronger as respects this provision, if the 162nd section had expressly required that both the Judges should agree before the candidate should be relieved.

To give effect to the contention of the respondent this would appear to have been an entire mistake, and that the law was and is what it clearly was not. The effect in my judgment is to relieve the respondent, after the passing of the Act, from the disqualification under which he was then labouring, but it cannot be held to mean that at the time when it was passed he was relieved.

And that in case of an election being set aside and a new election had to the same legislative assembly or otherwise, the new election cannot be avoided by setting up corrupt acts or practices by the candidate in or during the former election, or affecting the same which were not set up and proved at the former trial, and so adjudged by the two Judges at the former trial or by the Court of Appeal before the subsequent election as by law to involve such disqualification, disability or penalty.

It appears to me quite plain that this part of the section has no retrospective effect. It has reference to cases of an

election being, not to elections having been set aside, and to trials which may arise in consequence. So far from its having a retrospective effect the word *being* is used in the future, and simply means that if after the passing of the Act an election is set aside then the other provisions apply.

In my judgment the respondent was disqualified at the time of the election, and that the foregoing section does not relieve him. It has reference only to any future election.

I concur in the judgment just pronounced by my learned brother as respects the claim to seat the defeated candidate. I do not think, under the circumstances of this case, the electors who voted for the respondent can be said to have acted perversely, and therefore their votes were thrown away.

PRESCOTT.

PROVINCIAL ELECTION.

BEFORE MR. JUSTICE PATTERSON AND MR. JUSTICE
FERGUSON.

L'ORIGINAL, *July 24th, 25th, 26th, and 27th, 1883.*

BEFORE THE COURT OF APPEAL.

Present.—CHIEF JUSTICE SPRAGGE, CHIEF JUSTICE HAGARTY, MR. JUSTICE
BURTON, AND MR. JUSTICE OSLER.

TORONTO, *December 20th and 21st, 1883.*
January 19th, 1884.

ALEXANDER V. CUNNINGHAM, *Petitioner* V. ALBERT HAGAR,
Respondent.

*R. S. O. ch. 10, sec. 157—Treating on polling day—Corrupt practices—
Agency—" Meeting of electors for the purpose of promoting the election"
Treating—Illiterate voters—Duties of Deputy-Returning Officer as to—
Irregularity—R. S. O. ch. 10, secs. 94, 95, 97, 100, 146, 197.*

Section 157 of R. S. O. ch. 10, forbids the selling or giving of liquor at any time during the polling day, under a penalty of fine or imprisonment, and the same Act provides that any violation of that section during the hours appointed for polling, is a corrupt practice.

Held, (at the trial) that a violation of the section during the polling hours by an agent of the candidate, must be conclusively presumed to have been intended corruptly to influence the election.

At the trial it was found on a review of the evidence that an offer to bribe which had not been carried out, was not proved.

Held, on appeal, that the finding of the trial Judges should not be disturbed unless the Court above was convinced that it was wrong, and that if no more could be said than that the evidence might have warranted a different conclusion, it should not be interfered with.

S. who was a political friend and supporter of the respondent, treated a meeting of electors with the knowledge, though not with the direct assent of the respondent. It was proved at the trial that S. was a noisy, talkative man, employed as a travelling agent through the country: he had a bet or bets on the election: the respondent saw him at the meeting, and had some conversation with him in the crowd. Some time during the contest, and later than the date of the meeting, he went to respondents office to make some suggestions, and asked his

opinion as to the result, as he said some men wanted to bet with him. While there he saw some "campaign literature" on the table, and took some of it away with him, with the assent of the respondent. No evidence was given that he canvassed voters, and the respondent swore that he never gave him express authority to canvass or do any thing for him, and that he was not a man he would employ as an agent.

Held, (at the trial and on appeal) that at the time of the meeting S. was nothing more than a volunteer, for whose acts the candidate was not responsible.

Semble, where a corrupt act is committed during an election contest by an agent with the knowledge of the candidate, and it turns out that the person committing it was in fact or in contemplation of the election law, the agent of the candidate, it is not necessary that the candidate should, at the time have knowledge that the person committing the act is his agent, or even that he should know such person individually.

The Londonderry Case, 1 O'M. & H. 278, and *The Dungannon Case*, 3 O'M. & H. 101, referred to and followed.

A meeting of some 35 or 40 electors had assembled for the purpose of promoting the election. During the meeting an agent of the respondent went into an adjoining room with four or five friends and treated and was treated by them.

Held, by the Court of Appeal, not to be a furnishing of entertainment "to a meeting of electors assembled," &c., under section 151, R. S. O., ch. 10.

Per OSLER, J. A.—The question must always be, whether the entertainment has been furnished to the general body of the electors composing such meeting, whether before, during, or after the business of the meeting, and while as a body such electors remain together at the place of meeting or elsewhere.

The Deputy-Returning Officer in polling the votes of some fifty illiterate voters, instead of taking from each illiterate voter a declaration "that he was unable to read," asked each if he was able to read or write, and having received an answer in the negative, requested him to put his mark to the declaration of illiteracy explaining what he conceived to be its effect thus "You hereby sign that you are unable to read or write sufficiently to mark your ballot paper." He then openly marked the ballot paper as instructed by the voter in the presence of both candidates, their agents and the poll clerk, all of whom had taken the usual declaration of secrecy. One witness also said the constable was in the room.

Held, (at the trial and on appeal) that substantially there was no violation of the principle of secret voting laid down in the Act, R. S. O. ch. 10, and that the votes were not improperly taken.

Per OSLER, J. A.—There is nothing in the Act which makes it necessary that the Deputy-Returning Officer should withdraw with the agents of the candidates and the voter to another room, or which forbids the poll clerk or other persons lawfully present in the polling booth from remaining there while the voter announces for whom he wishes to vote.

Per SPRAGGE, C. J. O.—The illiterate voters were not misled, but the conduct of the Deputy Returning Officer was perverse. The manifest policy of the Act is that the voting shall be in all cases as secret as under the circumstances it can be. It was not necessary that more than the three persons named in the Act besides the voter himself should be present: the Deputy-Returning Officer and one representative of each candidate. The presence of any others was not in accordance with the spirit and policy of the Act and should not have been permitted by the Deputy-Returning Officer.

Per BURTON, J. A.—Beyond the slight mistake made by the Deputy-Returning Officer in explaining the declaration, there appears nothing in the course pursued which was not warranted by the Act, there was

no one present except the Deputy-Returning Officer, the candidates and their agents and the poll clerk, all of whom had taken the oath of secrecy except the constable, who was in another part of the room.

Although the irregularities of the Deputy-Returning Officer could not, by themselves, be said to have affected the election, *quære*, whether in conjunction with the before mentioned corrupt act which was found to have been committed by an agent of the candidate, they could under section 159, conjointly be said to have done so.

Held, (at the trial) that the irregularities in question were not "illegal practices" as mentioned in that section, but were rather defaults than acts or practices, and entirely unconnected with corrupt practices. What is referred to in sec. 159, is systematic illegality, whether amounting to corruption or falling short of it, to such an extent that the particular acts which are proved, may be reasonably considered merely to be instances in connection with the general system of corruption or illegality which has been prevalent during the contest.

THE petition contained the usual charges of corrupt practices.

The principal ones were those of (1) the selling of liquor during the hours of polling on the day of election by one Baulne, an agent of the respondent; (2) An alleged offer of lumber to build a house made to the petitioner by one Smith, an alleged agent of the respondent; (3) Treating of a meeting of electors by said Smith; (4) Irregularities by one of the Deputy-Returning Officers in the manner in which he polled the votes of several illiterate voters.

Hector Cameron, Q. C., and *A. Ferguson*, for the petitioner.

James Bethune, Q. C., *W. Johnston*, *P. O'Brian*, and *John Maxwell*, for the respondent.

PATTERSON, J.A.—As to charge No. 56, which is a charge that Baulne, an agent of the respondent, was guilty of a corrupt practice by reason of the violation within the hours of polling of the provisions of section 157, there are several questions which we have to consider and dispose of.

We have no doubt that, as a matter of fact, Baulne did, upon the polling day, and within the hours of polling, sell liquor to persons, being those persons mentioned in the evidence; and that therefore, as far as he personally

was concerned, he was guilty of a violation of section 157, and guilty of a corrupt practice.

The principal question is, the question whether upon the evidence he should be held to be the agent, and this practice to have been committed by an agent of the respondent.

We are of the opinion that the evidence which we gather from the examination of the respondent himself principally, as well as whatever other evidence there is, makes it obligatory upon us to hold that Baulne occupied the position of agent of the respondent.

It is clear from what is stated by the respondent in his evidence that he relied upon his friends—his friends in the constituency generally—to support his election. He speaks of himself as a candidate; that his candidature was forced upon him. He says, “I expect my friends to support and elect me.” He states that at the meeting at Plantagenet a committee was formed, and gives the names of a number of the committee, including Mr. Baulne. He states, and it is apparent in fact from the examination generally, that he expected his friends to work for him, and those in particular whose names are individually mentioned. Whether they actually worked or did not work is not the point I am immediately considering. Now, if in the course of the election contest any corrupt practice, that is, actually corrupt, done with the intention of corrupting an elector to induce him to vote for the respondent, had been committed by Baulne, it would be impossible to hold that he was not within the scope of the agency to be attributed to him under the doctrines that prevail with respect to agency in election matters.

I do not think it is at all necessary to shew that a person who is designated as one of those whose assistance the candidate looks for shall have done any particular acts: shall have taken any particular course: worked to any particular extent: in carrying out the agency which was constituted. The very first act which any person relied upon in that way does might be a corrupt act, and it would

be an act by an agent just as well as if it was at the end of a long series of acts.

There is a question, however, and it is a question which was argued by Mr. Bethune, which has possibly caused some little doubt in other cases, and that is where a person occupying the status of agent, with the widest scope of authority covering all the incidents of an election contest, does an act which has no reference whatever to the election contest, but is spoken of in the statute as being a corrupt practice. That seems to be one of those things in the statute which it might be difficult to deal with and construe with very direct reference to any particular principle underlying the provisions.

Considering the matter, and talking it over, as my learned brother and myself have now done, it seems to me that there is a principle that we can apply to it which removes any difficulty, and will give full effect to the intention of the Legislature in passing the Act.

Section 157 forbids the selling or giving of liquor in any shop or place of the kind at any time during the polling day. That is a provision which was originally passed as one of a series of provisions for the purpose of preserving peace and good order at elections. It is made penal, on the part of any one to whom that section applies, to give or sell liquor at any time during that day. Then comes in, however, the other provision that an offence against that section committed within the polling hours shall be a corrupt practice. Now, what is the proper construction, the proper force, to be given to that enactment of the Legislature, that the offence within those particular hours shall be a corrupt practice? It seems to us that that is a declaration, a distinct declaration, that an act which is made penal at any time during the day, is if committed within those hours, to be attributed to a purpose connected with the election. When it is said that it is a corrupt practice if committed between those hours, the Legislature says, in other words, the act done within those hours is to be deemed conclusively

a corrupt practice. If a corrupt practice it must be a practice intended corruptly to influence the election, as that is the meaning of the words "corrupt practice."

Therefore, in making³ that particular enactment, and giving that particular effect to the act done within polling hours, the Legislature seems to have removed from the Courts the duty of inquiring what was the intention with which the act was done, having attached to it the character of a corrupt practice, and necessarily therefore giving it the character of an act intended corruptly to influence the election.

Treating it in this case as having that force, we have then the Legislature declaring that Baulne when he sold the liquor within those hours, did so for the purpose of influencing the election; and whether we would be satisfied that that was so, or whether⁴ we may be satisfied that he had no such intention, we must take it, as I apprehend, that the Legislature has said that is to be deemed to be his intention. If so, it was clearly within the scope of the agency which the law attributes to him under the facts which we have in evidence.

The conclusion that we come to therefore is that under this 56th charge a corrupt practice is shown to have been committed by Isidore Baulne, an agent of the respondent, but without the knowledge and consent of the respondent.

FERGUSON, J.—As the judgment just delivered has been the judgment of the Court, it is unnecessary for me to say anything more than that I concur.

I am entirely satisfied that the remarks as made by my learned brother give the proper solution of the matter.

The section of the statute says to the party, you shall not sell or give. It also says it shall be deemed to be an act done with reference to the election, whether it was so in fact or not.

That being my construction of it, I agree in the conclusion of my learned brother.

PATTERSON, J. A.—There were two charges in which Smith was concerned, which we reserved for consideration. One is charge No. 36, which related to an alleged offer to the petitioner of lumber to build a house, and the other charge related to the treating of the meeting at Wendover represented by Nos. 48, 49, and 50 of the particulars.

With respect to charge No. 36, we are of opinion that as a matter of fact no offer such as is alleged by the petitioner was established. As the evidence is given to us, even on the part of the petitioner himself, there would be a good deal of question as to whether anything took place between him and Smith which really conveyed to him any undertaking upon the part of Smith that if he voted for or assisted in procuring votes for the respondent he should receive the lumber in question. Smith gives a different account of the transaction, and according to his evidence all that can have passed between him and the petitioner was an offer on his part to convey to the respondent the petitioner's offer.

The evidence as to an unaccepted offer requires to be dealt with with a good deal of caution: it should be looked upon with somewhat greater strictness than in a case where an offer has been accepted and where anything has been taken by which the terms of the offer or bribe, or whatever it may have been, have become definitely fixed, and there is less reason to apprehend that the parties may not have distinctly understood in the same way what took place.

We could not find upon the evidence here that the charge of an offer such as is set up is established.

As to the charge of treating at the meeting, which is represented as I have said by numbers 48, 49, and 50, there is no reasonable doubt upon the evidence that the act did take place as charged; that the meeting there was a meeting of electors assembled for the purpose of promoting the election; and that Smith was guilty of the statutory offence under section 151, of providing drink or entertainment at his expense for that meeting. It also established, as we think, as the fair result

of the evidence, that what Smith did at that meeting was, done to the knowledge of the respondent. He himself tells us, and there is no doubt upon the whole evidence—he does not express any doubt about it on his own part—that the treating that was going on at the meeting, which was done on both sides, was something the nature of which he was perfectly well aware of, and which, if he did not actually participate, as he may have done by taking a cigar at a treat which one of his opponents was giving, was still a proceeding the nature of which he understood very well. He knew exactly what was going on, and it was not at all disapproved of by his doing anything to stop it. He tells us that he did hear, as he was leaving, Smith calling up the treat, as it is called; asking the Evanturel men as well as the Hagar men to come up; so that the fact of Smith having violated section 151, and of that being with the knowledge at all events—I was going to say with the knowledge and consent, and probably I might use that expression, but I do not wish to use it in the sense of anything like active participation in what Smith was doing—but it was with the knowledge, and without the disapproval at all events of the candidate. Those facts, we think, are made out beyond any reasonable question by the evidence which has been given.

The important question, the question which would affect charge 36 as well as this, is whether Smith should upon the evidence be properly held to have been an agent of the respondent.

The general history that we have with respect to Mr. Smith is, that he is a person mixing a great deal with people, doing so in the pursuit of his calling as agent for the sale of implements and as an insurance agent, frequenting taverns and other places where people assemble a good deal, talking politics and talking upon one particular side of politics, not only during election times but at other times. There is no doubt that he was doing so during this election; his own evidence and the evidence of

others show that. That by itself would not constitute him by any legitimate inference an agent of the candidate.

A person no doubt, as is well settled by the decisions under the election law, may be fixed with the status of agent for a candidate, and the candidate may be made liable for the acts of a person as agent whom he does not know to be acting on his behalf, and in fact of whom he may have no personal knowledge whatever. A man may become an agent by being a member of an organization to which, as an organization, the candidate has looked, or upon which he has relied, for his support during an election contest; or he may become an agent by being appointed by one who is already the duly authorized agent of the candidate; and so agency may exist on the part of a person of whom the candidate has no individual knowledge at all.

He knew Smith in this case; but so far as the evidence goes, the knowledge that he had of Smith and of the character of the acts of Smith, up to the time that this meeting took place, would not be at all sufficient evidence to establish any connection of the nature of agency in these matters between him and the respondent.

The knowledge that he had of Smith, according to the evidence which he has given here, ought probably rather to be taken to indicate a different conclusion; because knowing that he was a man talking a good deal, somewhat rash and reckless, which is what I gather from the statement of the respondent himself, he was not the man whom he would have selected as his agent or whom he would have trusted in that character.

No doubt, as I have said, a man may become liable for one whom he would not select himself.

What is relied upon to establish agency here are incidents which took place in which Smith is traced into more direct connection with the respondent.

The evidence with respect to these incidents relates to two different occasions on which Smith speaks of having been present in the office of the respondent, and at which something took place between them.

The respondent tells us of one of those, and speaks also as he thinks of both, fixing one of them at a date later than the election, and giving the date of the other as several days or several weeks, I forget which, some time at all events, after this meeting—several days I think he said—and that is the only evidence we have as to the date of that particular interview.

What took place at that interview is not shewn with very much precision. Smith says, no doubt they talked about election matters, and the evidence of the respondent so far agrees. As the respondent puts it, Smith came there and asked particularly about how the election was going, what was his prospect, what was his probable majority, telling him that he had been offered some bets.

It appeared, I think, from the evidence of Smith himself that he had been betting, not betting in the way in which betting is used as an instrument of bribery, not betting in such a way as to make it to the interest of supporters of the other side to vote for the side on which Smith was interested, but betting on the candidate he was supporting.

On that occasion at the respondent's office, there was some of what is called "campaign literature," some of which Smith took, the candidate allowing him to do so; and allowing him undoubtedly, as he does not deny, with the idea that this would be used to some extent for circulating in this constituency, and also supposing it would be used in the adjoining county where Smith lived.

Whether or not those occurrences upon that particular occasion would be held to be sufficient evidence of agency is a matter that I do not think, in the view that we take at present, we are required very distinctly to decide. I do not doubt at all, that they are legitimate evidence going in support of the view that an agency was constituted between Smith and the respondent; and possibly, if anything had been done after that date by Smith which came in question in a contest of this kind, the evidence might turn out to be evidence of a good deal of cogency

which the respondent would find it very difficult to get over upon the question of agency. There is nothing, however, that from the consideration we have been able to give to it, we can properly treat as evidence shewing that any agency had existed at an earlier date.

Mr. Bethune has argued that, on the ordinary doctrine of ratification, there was nothing that could be ratified by the respondent by anything he did there; because in order to ratify what is done by a person professing to act in your behalf, it is necessary that you should know the act which is the alleged subject of ratification.

I do not think the question of ratification is one which would arise in the case.

I think the proper argument was the one which Mr. Cameron advanced, that what took place upon that occasion might be taken as evidence, not that the agency was then for the first time established, but that the agency had existed all along, and that this was a recognition of the existence of the agency, and so that at the time of the Wendover meeting Smith was in fact the agent of the respondent.

We are not able to take that view; the agency as far as it would be established by that evidence, if that evidence were held to establish an agency, could not, in our view, be taken to relate to the earlier date.

There is one case that Mr. Cameron referred to upon this subject of the offer to bribe, viz., the *North Middlesex Case*, tried by Mr. Justice Wilson. Looking at that at the time Mr. Cameron referred to it, it just struck me that a similar position arose in that case. I do not refer to it as an authority, but merely as one in which a similar position arose. The case there was as to whether a bribe had been offered seriously or in jest, and upon the evidence it was held to have been only offered in jest; but the same question arose as to whether the person charged with having offered the bribe, one Stephenson, was at the time he offered it, at the time of the alleged offer, an agent, although he undoubtedly became so afterwards, and under the facts

in that case, the view taken was the same that seems to us to be the correct view in this case, that even if Smith became an agent afterwards, he was not at the time of this meeting in Wendover an agent.

There is a point in connection with that which, if it were held otherwise, or if we should be held to be incorrect in our view of this question of agency, I think we might express an opinion upon, particularly as a point which has been pressed in argument a good deal by Mr. Bethune, and that is, when dealing with the question of a corrupt act being committed by an agent with the knowledge and consent of the candidate, whether it is necessary that the candidate should, at the time, have knowledge that the person committing the act is his agent.

In my view, that is not at all necessary. If a corrupt act is committed in the course of an election contest with the knowledge of the candidate, and it turns out that the person committing it was in fact, or in contemplation of of the election law, the agent of the candidate, my opinion is that for the purposes of the statute it is quite unimportant whether the candidate knew at the time that the man was his agent, or even knew the man individually.

It was with reference to that consideration that I made the remarks a few minutes ago, as to the possibility of a person being an agent of a candidate without the candidate even knowing the man.

If the candidate sees a man whom he does not know professing to do an act on his behalf, a corrupt act that he has knowledge of, if the man is in fact his agent, although he may not know that he is committed to him in that character, or not even know the man at all, I think the statute would require it to be held that a corrupt act was done by an agent and with the knowledge of the candidate.

There is another view also which we have considered with respect to this, which I may just as well express, although I do not know that it bears materially upon anything we have this moment to decide, and that is whether a candidate seeing a person doing an act professedly on

his behalf, though there may have been no previous agency, by standing by and not repudiating it adopts the man, for that occasion at all events, as his agent.

I refer to this for the purpose of saying principally that we have not overlooked that view of the matter in considering the case. My own impression is, although as I have said I do not think it necessary to pronounce it just now as a final decision, that if a candidate stands by, sees a person, or hears him, attempt to influence an elector on behalf of that candidate; that being done in a corrupt manner by the offer of a bribe or the commission of any other corrupt act, and he allows that to go on without interfering or without repudiating it, it would be exceedingly hard for him to escape the imputation of that act being done as his agent; he knows of the act being done on his behalf, and he permits it to be done.

I do not think it would be fair to apply a consideration of that kind, however, to the particular circumstances of this charge for this reason: undoubtedly, as I have said, the candidate knew that Smith was calling up a treat, as it is called, at that meeting, but then I do not treat that for the purpose of the view that I have just now been putting, as necessarily to be attributed to the candidate as something known to him to be done on the occasion on his behalf. The statute itself, by what may be called an arbitrary enactment, makes the furnishing of drink or entertainment to a meeting of electors a corrupt practice, quite irrespective of its being in itself accompanied by any intention to corrupt. We have had a number of cases, on former election trials, in which the question of treating as a corrupt practice has been discussed, and in some of which it has been held that the treating was not a corrupt practice: was not done corruptly, because it was merely something which, although done to a considerable extent to electors, was only what the man would have done under any circumstances, what was very habitual, an act which he did not refrain from doing at that particular meeting, doing it as he would have done at any other meeting; and it

has been held that such an act was not done corruptly. In other cases the habit of doing it has not been held to excuse the act. I am not pronouncing any opinion as to how those decisions should have been, one way or the other ; but I allude to this for the purpose of saying that what was taking place here was an occurrence of the kind, which, as far as one can judge from the evidence and what one knows and hears of these matters, is what was likely to occur whether this was an election meeting or not. This treating was going on, not as an exceptional sort of thing, but as I have said what was habitual and what would be almost sure to take place.

The statute undoubtedly attaches to the act the stigma of corruption for the purposes of the election law, but when we come to consider how it should be really regarded with respect to the parties, I do not think it would be fair to the candidate who merely hears that another is treating, hears one of his friends, one of those whom he knows to be favourable to his side of politics, calling up parties there at the meeting to treat them, to attribute to him the knowledge for the purpose of this section, that this was an act done on his behalf in such a way as to give that the force of the adoption of the act.

Upon those grounds we think the agency of Smith has not been established, and that therefore the charge of treating at the meeting also fails.

The last charge which we have now to dispose of is that contained in the 9th paragraph of the petition, which alleges that the deputy returning officer at sub-division No. 3, in North Plantagenet, irregularly, illegally, and in violation of the Election Act of Ontario, did refuse to give ballot papers to a large number of duly qualified voters at the election, and compelled those voters to declare at the time of voting for whom they intended to vote, instead of allowing the voters to mark their own ballot-papers secretly as provided by the Election Act of Ontario, whereby it is alleged that the votes were illegal and void and should not have been counted.

In support of the charge as to the facts upon which it is based, the evidence given is that of the candidate Mr. Evanturel, and of Dr. Mignault who was his agent at the poll, and they give their evidence stating in rather general terms that practices something of the kind indicated in the paragraph that I have just read,* were done at the poll by Mr. Chamberlain who was the deputy returning officer.

The evidence given by Mr. Chamberlain does not agree entirely with the evidence given by the witnesses on the part of the petitioner, and makes more definite some of those things of which they spoke rather generally, but the general facts as we gather them are these :

That a number of voters at that poll, some forty or fifty or thereabouts, were men that could not read. I do not know that any one of those whose votes are spoken of was able to read, with the exception of one man, of whom it is said that although he could not read he knew something about some of the letters or something of that kind, but speaking of them as a whole, the fact is stated on both sides that they were men who could not read. With respect to these, the irregularities complained of are of two kinds, two of the kinds mentioned in the 197th section. That section deals with three different things. One is failure to hold the poll at the place appointed ; the second is non-compliance with the rules in the Act as to the taking of the poll or counting of votes ; third, any mistake in the forms contained in the schedules. Two of these which are relied upon now as irregularities are non-

* 8. That at said election the Deputy Returning Officer at Polling Sub-division No. 3 in the township of North Plantagenet, and the Deputy Returning Officer at polling sub-division No. 2, township of Longueil, irregularly, illegally and in violation of "The Election Act of Ontario," did refuse to give ballot papers to a large number of duly qualified voters at said election, and compelled said voters to declare at the time of voting for whom they intended to vote, and marked their ballot papers for said voters, and counted said ballot papers instead of allowing said voters to mark their own ballot papers secretly as provided in said "Election Act of Ontario," whereby and by reason whereof said votes were and are illegal and void and should not have been counted.

compliance with the rules contained in the Act as to the taking of the poll, and mistake in the use of the forms contained in the schedules to the Act; or if what is alleged is argued not to come properly within the term mistake in the use of the forms, it seems it must come within the other definition, non-compliance with the rules as to taking the polls, so that one or other of those particulars covers the alleged irregularities in this particular instance.

Now one irregularity principally dwelt upon is the neglect to read to the person coming to vote the declaration which the statute requires the Deputy Returning Officer to certify was read to him, R. S. O. ch. 10 sect. 100 Sched. A form 24.

Another is the refusal to allow some of those people who had signed a declaration to vote by taking the ballots and marking them themselves.

As far as we can gather from the evidence given here, it is difficult to see how anything which was done then can be said to have affected the result of the election, for the reasons which I am now going to mention.

As I have already said, it is not disputed on either side that not one of these voters was a man who could read. What the deputy returning officer did, instead of reading and explaining fully or properly the declaration which the illiterate voter had a right to make, was to give his version of the effect of it as he understood it, and in doing so he undoubtedly according to his own statement did represent something different from what the statute required or what the declaration contained because, according to his statement, he tells him that there is a declaration that the voter is not able to read or write sufficiently to mark his ballot.

Now, as I pointed out when Mr. Bethune was arguing taking simply the case of a person of whom he knew nothing, I should be inclined to think that direction was calculated to mislead, because when a man is told that he is to declare that he is unable to write sufficiently to mark his ballot, he might very naturally suppose that marking

the ballot meant writing the name of the candidate ; and although he might be able to truly declare that he was unable to write sufficiently for that, he might be able to read the ballot paper and to make his cross at the proper place intelligently, knowing what that meant and what he was doing ; but according to the facts which we have that could not have made any difference here, because the fact is conceded on all hands that none of these people could read. If a ballot paper had been put into the hands of any one of them and he had been told to go and mark it, what would have been done ? The illiterate man who could not read would know nothing about what was on the paper or what he was doing.

Then it is said the returning officer had some duty under section 95 to give some explanation. That clearly is not any thing which could be resorted to under the circumstances we have here. Section 95 is that the deputy returning officer may and upon request shall, either personally or through his clerk, explain to the voter two things : one is the mode of voting ; that is, he would have to tell the voter, "you are to take this ballot paper, you are to go into the compartment and mark the cross on the right or left hand, whichever it is, opposite the name of the candidate ; you are to fold the paper in a particular way and bring it and deposit it here."

Now if he had done that he would have explained the mode of it. Then he was to explain the colors in which the names were printed. There was no such requirement in this case, that being a matter to be attended to when the candidates had agreed upon different colors.

Therefore all the information which the deputy returning officer, even if asked to give it, was bound or at liberty to give here would not have informed these illiterate people, who would still have required somebody to read for them the names of the candidates, and to point out something on this ballot paper that the deputy returning officer was neither bound nor at liberty under section 95 to do.

Then again, looking at the section, he was not bound to do it except upon request, and there is no pretence of his being requested to do anything; and so when we are told that certain of these illiterate voters, after having signed the declaration which, as far as they understood it, was perfectly true, that they were unable to read, when they said: "Oh, but I can mark my ballot paper," it is impossible that they could have meant anything more than this: "If you or some person else will tell me which is the name of one and which of the other and shew me where I am to put my mark, I can mark it." There is nothing to shew that they could have intelligently marked the ballot paper; so that from what is told us in that way it is impossible for us to say that anything that took place there could have interfered with or altered the actual vote of these men as far as the question of secrecy or open voting was concerned; and as to their having voted as they did in a different way from the way they otherwise would have voted, it is nothing but mere conjecture that we could go upon in reference to that. What is argued by Mr. Cameron is, that those people having felt themselves coerced to vote openly were brought under the influence of the candidate who was there, which might possibly lead them to vote in a different way from the way they otherwise would have voted; and one man says that really was the case, or something to that effect.

With respect to that, as I have said, we have nothing in the way of fact or evidence on which we can form any such conclusion. If the argument is, that the election really was affected by what took place in this way by reason of the voters being influenced to vote differently from what they would otherwise have done, that is not the charge which is made by the petition. The charge is, that an irregularity in this mode of conducting the election took place, and that by reason of that irregularity the votes ought not to have been counted. Regarding what as a matter of fact took place, it is impossible that we can either say that it was likely that the election was affected or

that it was affected, or that we would be justified in finding except as in the form here that what did take place did not affect the election. That is, it appears to us that these men were all illiterate men who must have voted, if they voted at all, in the particular way they did vote; that voting in the particular way they did vote they could not have voted except under precisely the influences which it is complained now that they had to vote under; and that voting in that way they voted in the only way which, under the circumstances and in compliance with the statute they could have voted.

It is said that the rules respecting the taking of the poll were not complied with in another respect, because the returning officer marked these ballots sitting at his ordinary seat and in the presence not merely of the agents of the parties, but the parties themselves, possibly also within the hearing of the constable at the other end of the room.

I do not find anything to show that what is complained of in that respect was in any way a violation of what the Act provides.

The Act provides for secret voting in the case of all persons who are able to read and mark their ballots; and it provides, for those who are not able, that they may when certain things have been done declare for whom they vote, and the returning officer may cause to be marked on the ballot for whom the vote is given. It also declares that this shall not be done by the returning officer behind the backs of the agents; that the agents for both parties must be present; but that in no way prevents other parties from being present. We have to hold that other persons than the returning officer and the agents are not to be excluded from that particular vote, they having a right for other purposes to be there.

It was argued also, and I have to notice the argument, that although there may be nothing in these irregularities by themselves to affect the election, and it is quite clear there is not, still the effect of those might under section

159, in conjunction with the corrupt act which is found to have been committed by an agent without the knowledge and consent of the candidate, have a greater effect.

Section 159 declares that to prevent the expense and trouble of new elections in case of corrupt acts being committed without the knowledge of a candidate, if the corrupt act was of such a trifling character that the result cannot have been affected or be reasonably supposed to have been affected by it either alone or in conjunction with other illegal practices, such corrupt act shall not avoid the election.

It has been properly conceded that the corrupt act which was found, the selling by Baulne, could not by itself in any way have affected the election. I have no doubt it could not, even though some of the persons who partook may not have actually voted at the time ; but this section 159, when it authorizes the coupling of a corrupt act insufficient in itself to have affected the election with other illegal practices, does not, as I understand it, contemplate acts of the character of those which are in question just now, which are properly called irregularities merely, and which coming, as we hold they do, within the terms of section 197, are defaults rather than acts or practices. Though it is a breach of duty to be guilty of any irregularities of the kind, I do not think that those are at all intended by the term "illegal practices" in section 159.

No doubt an illegal practice may be committed by a returning officer if he is guilty of anything like undue influence or anything of that sort, as well as by any other person, but that would be something quite different from this mere default in the strict compliance with the duty that the statute imposes. Those I do not think are treated as illegal acts at all ; I think in their character they are different from what is intended by the illegal acts or illegal practices.

Then I find the term "illegal act" used in at least one case and probably more in the statute, as for instance with respect to hiring teams, and I am not sure where else, and in section 197 I find nothing of the same meaning in

the terms which are used, but these words used advisedly or used deliberately, and repeated almost each time in the same sense, "failure," "non-compliance," and "mistake." It deals with those three things. I do not think it deals with them as "illegal acts." Although they are irregularities or defaults, they are not illegal practices within section 159.

But then I think further, that the meaning of section 159 is this : one corrupt act committed by an agent, or several corrupt acts committed by agents, may be of such a trifling character or extent as not in themselves to be susceptible of being deemed in any way to have affected the election. It may, however, appear that in the prosecution of the election generally there has been systematic illegality, whether amounting to corruption or whether falling short of corruption, to such an extent that the particular acts which are proved may be reasonably considered merely to be instances in connection with the general system of corruption or illegality which has been prevalent during the election contest, and I think that is what is referred to when in section 159 it speaks of these corrupt acts of trifling extent as being reasonably supposed to have affected the election, either alone, or in connection with other illegal practices.

Now, I do not think that intends us to add to corrupt or illegal practices which may be shewn, but which by themselves could have no effect upon the election, acts which in their character are entirely unconnected with corrupt practices. I think, in regard to the present charge, that the irregularities which were complained of are so utterly dissociated from the corrupt practice which we have found to have been committed by an agent, that even if the irregularities came within the definition of "illegal practices," we could not have treated them in any way as being practices to be brought into cumulative connection with this practice to which they have no relation, and as to which they do not at all indicate a common origin or their origin in a general system.

There is just one expression in section 197 which I did not allude to, and that is the necessity for finding that the election was conducted in accordance with the principles laid down in the Act.

As to that we have no hesitation in finding that this election was conducted in accordance with the principles laid down in the Act.

We do not consider that that expression "the conduct of the election" refers to the particular irregularities which are the subject of this particular charge. It has reference to the conduct of the election generally, and there is no doubt in our minds upon the evidence that as to freedom of election, as to secret voting, and as to all those other safeguards that the Act points out, the election generally has been conducted in accordance with the principles of the Act.

The particular irregularities are those which come under two of these three things which are pointed out here, "failure," "non-compliance," and "mistake," being either non-compliance with the rules, or mistake in the use of the forms, and have nothing to do with the question of the general conduct of the election which we think is that that is referred to in this expression referring to the principles laid down in the statute.

We therefore decide against that charge also, and have further to decide merely as to the general result of the petition and as to the costs.

The petition is dismissed; and then under section 160 of the statute, as a corrupt practice committed by an agent though without the knowledge and consent of the candidate has been established, costs have to be dealt with in the same way as they would have been dealt with before this other clause had been passed. As to that the costs must follow the result in the ordinary way in contests where a variety of questions are raised. I think that among the different cases in our own Courts in which the question of costs has been decided, the same principles have been acted upon a good deal. I am taking the case of *Welland* decided by Mr. Justice Gwynne, the Provincial

Election case, in 1875, H. E. C. 198, and I think upon that general principle we should deal with the costs in this case.

In that case the learned Judge ordered the respondent to pay the petitioner the costs of the trial except as to certain charges in respect to which he said both should pay their own costs, and in respect to others the petitioner should pay the respondent's costs.

The opinion of myself as well as my learned brother is, that the respondent should pay the costs of the petition and trial, but just to the same extent as if this charge in respect of Baulne had been the only charge upon which the petition was founded ; and then as to the other charges which may have been brought against the respondent, and upon which the petitioner has failed, that the petitioner should pay the respondent's costs.

FERGUSON, J., concurred.

From the judgments on these charges, and on other charges, the petitioner appealed to the Court of Appeal.

H. Cameron, Q. C., and *McCarthy*, Q. C., for the appeal
Bethune, Q. C., and *W. Johnston*, contra.

January 19, 1884. OSLER, J. A.—On the trial of the petition it was found that an agent of the respondent had been guilty of a corrupt practice under section 157 of R. S. O., ch. 10, without the actual knowledge and consent of the respondent, but that it was of so trifling a nature that the result of the election could not have been affected thereby, and the election was therefore not avoided.

The petitioner now appeals from the decision upon other charges of corrupt practices committed by agents of the respondent, and of certain irregularities alleged to have been committed by the deputy-returning officer, (who was

also an agent of the respondent) at polling sub-division No. 3, North Plantagenet.

The first charge, which is the subject of the appeal, is that of an alleged offer by one Wm. Smith to bribe the petitioner. The only evidence on the charge was that of the petitioner and Smith. Smith's agency was not admitted, but the learned Judges, upon a review of the evidence and considering that the charge was that of an offer or attempt to bribe which had not been carried out, came to the conclusion that it was not established. They have not reported as to the demeanour of the witnesses under section 68 of R. S. O. ch. 11, and we are asked to review their decision upon reading the evidence.

Speaking for myself, I think we ought not to disturb the finding of the trial Judges on such a question, unless we were convinced that it was wrong. My own impression from the evidence is, that the charge is not made out beyond a reasonable doubt, and if we could do no more than say that the evidence might warrant a different conclusion, we should not interfere.

The next charge is that of a corrupt practice under section 151, R. S. O. ch. 10, viz., providing or furnishing drink, &c., at the expense of the candidate or other person, to a meeting of electors assembled for the purpose of promoting the election. As to this, it seems reasonably clear that Smith (the person charged with the attempt to bribe Cunningham) did treat a meeting of electors held at Wendover, on the 21st of February, the day after the nomination. It has also been found that he did so with the knowledge though not with the assent of the respondent. The only question therefore to be considered is whether Smith was an agent.

The learned Judges have held that he was not.

I have carefully read the evidence which bears on this part of the case, and think it may be fairly summarized thus: Smith was an insurance agent, and agent for the sale of agricultural implements. He resided in the county of Dundas, but the county of Prescott was part of his "dis-

trict," and in the course of his business he had occasion to travel through it a good deal. He was an acquaintance and political friend of the respondent, and a noisy, talkative man, fond of talking and arguing about politics in taverns or stores, wherever he could get an audience, especially during an election contest. He did so during the present contest, and it was said he had done so in the course of former elections in the riding when the respondent was a candidate. The respondent no doubt knew what his habits were in this respect. There is no evidence that he ever canvassed voters. He came into the riding, in the course of his business, ten or twelve days before the polling day, and remained in it until the Saturday previous. He brought with him some political pamphlets, or fly sheets—"campaign literature" as it was called—which he distributed in the course of his travels through the riding. He had a bet or bets on the election, and was present at the Wendover meeting. The respondent says he thinks that was the first time he had met Smith during the campaign, and that he had some conversation with him, "off and on among the crowd, during the meeting." One Murray says he saw him there, "that he was saying Hagar was going in, talking about the Mowat Government, and arguing the point with me and others; Hagar was then in the room." It appears also, that at some time during the contest, Smith went to see the respondent at his office to make some suggestions as to people he (the respondent), should see; as he expressed it "there were some wires I wanted him to spring." The respondent thought this interview was subsequent to the Wendover meeting, but it was strongly argued that it must have been prior to it, and it was much relied upon as establishing Smith's agency. The learned Judges adopted the respondent's view of the date of the meeting, and I don't think that it is absolutely inconsistent with the evidence. The respondent's account of what occurred there is as follows: "Smith came to my office, asked me particularly about the election, how I thought it was going. He was anxious for

my opinion as to the result. There were men wanting to bet with him. He is a kind of sporting man. I told him it was going to be close, but I expected to win. I had a lot of 'campaign literature' lying on the table, and he says, 'I'm going to take some of that.' I said, 'all right, you can take what you like.' I knew he was going through the county and the next one too. He took what he wanted. I never gave him express authority to canvass or do anything for me. He is not a man I would employ as an agent."

If it had been shewn that after this interview Smith had canvassed for the respondent, or had done any other acts to further his election, and knowledge of his conduct had been brought home to the respondent, there would have been some ground for arguing that there was evidence of agency because it might be said that in such circumstances there was an implied authority to canvass, but I cannot agree that the doctrines of election agency should be carried so far as to fix a candidate with responsibility for the acts of a volunteer "orator" or supporter, merely because, knowing that he is such, he has permitted him to take away with him, whether for his own use, or for distribution among his friends, the campaign literature referred to. In the *Londonderry Case*, 1 O'M. & H. 278, Mr. Justice O'Brien said, "I cannot concur in the opinion that any supporter of a candidate who chooses to ask others for their votes and to make speeches in his favor, can force himself upon the candidate as an agent."

No doubt if a candidate requests or permits a supporter to accompany him to meetings and to address such meetings in his favour, that may be some evidence of agency: *Cornwall Case*, H. E. C., 547, at least as to corrupt acts committed at or in connection with such meetings.

In the *Dungannon Case*, 3 O'M. & H. 101, Baron Fitzgerald says, that before a party is made chargeable as an agent it must be made to appear that he has been entrusted in some way or other with some material part of the business of the election which is ordinarily performed

by the candidate himself. That entrusting may be made but by implication. Then he says: "The circumstances of each case may differ, but that implication must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election. If that part of the business of an election which ordinarily and properly belongs to the candidate himself be done to the knowledge of the candidate by some other person, it appears to me that that other person is an agent of the candidate."

Applying these authorities to the present case, and even assuming that the Wendover meeting was subsequent to the interview between Smith and the respondent, I think we should not be justified in holding the former to be anything but a volunteer, for whose acts the candidate is not responsible. If agency by implication is to be made out here, it will not be difficult to father upon the candidate the agency of every voluble supporter in the riding who may have seen and talked to him on the subject of the election. I refer also to *The Staleybridge Case*, 1 O'M. & H. 70, 20 L. T. N. S. 75; *Taunton Case*, 2 O'M. & H. 66; *Hereford Case*, 21 L. T. N. S. 117; *Welland Case*, H. E. C. per Gwynne J. at p. 194.

The next charge is that of treating a meeting of electors at Scott River. What occurred there, according to the evidence, was this: A meeting of some thirty-five or forty electors had assembled for the purpose of promoting the election.

While it was going on an agent of the respondent went into an adjoining room with four or five of his friends, and there treated and was treated by them.

What the statute forbids is the furnishing or providing drink, &c., "to any meeting of electors assembled, &c," R. S. O. ch. 10, sec. 151. A penalty of \$100 is imposed upon every person who offends against the provisions of the section. And by the 11th sub-section of section 2, any violation of its provisions is made a corrupt practice. The same evidence must be given to prove the latter, as would be required to maintain an action for the former.

It must be proved (1) That there was a meeting of electors assembled for the purpose of promoting the election; (2) That the candidate or other person provided or furnished drink or other entertainment to such meeting.

I may refer to some of the cases in which the section in question, or its predecessor has been considered.

In the *North Middlesex Case*, (1875) H. E. C. pp. 376, 382, the present Chief Justice of this Court, (then Chancellor) said: "I am not in the least disposed to sanction any evasion of the law, or to insist upon too rigid a construction of the provisions of the section. It would indeed be a rare case, if a possible one, that treating should be given literally to a meeting of electors. It was not so in the *Dundas Case*, (1875) p. 205, to which I applied the Act." In that case there were two charges of this kind. In the first, the treating was of a gathering of ten or fifteen persons in the bar-room of an hotel, near a hall where a public meeting for the purpose of the election had been held, about an hour after the meeting was over. This was held not to be a meeting of electors, the learned Chief Justice observing that there had been no adjournment of the meeting held in the hall, and no pre-concerted arrangement of meeting at the hotel, but an accidental meeting of a few persons.

In the second charge it was shewn that an agent of the respondent treated on nomination day. The whole report of the case is exceedingly obscure, but I infer that before the meeting at the nomination had separated, the agent in question, one Farlinger, and another person present at the meeting, crossed the street to a tavern about forty or fifty feet from the place where the nomination was held, and there treated all who were in the bar room, paying \$7 or \$8 for the treat. The persons so treated had probably been present at the nomination meeting. All that the report of the case says as to this charge is, "The treating by Farlinger, he (the Chancellor) held, came within the mischief of the law, as it was a treating of the electors at a meeting of the electors to promote the election."

In the *West Wellington Case* (1876), H. E. C. 231, an agent of the respondent brought a jar of whiskey to a public meeting of thirty or forty electors, held for the purpose of promoting the election, and just before the business of the meeting began, he handed it round among those present. Mr. Justice Gwynne held this to be, as it undoubtedly was, a violation of the law.

In the *East Peterborough Case* (1875), H. E. C. 245, there had been a public meeting of electors at Apsley, in the town hall. After the meeting the respondent and a person held to be his agent, went to a tavern near the hall, and a number of the electors who had attended the meeting went there also. The agent treated them from about ten at night till two o'clock in the morning. Draper, C. J., said, at p. 251: "Another difficulty has been suggested, namely, that the treating did not take place in the building within which the meeting assembled, and that the meeting was in fact over. A similar question arose in the *North Wentworth Case*, and I there held that where a meeting had been held for the promotion of an election, and after the transaction of the business, they had gone generally together to a neighbouring tavern on the invitation of the candidate, on whose behalf the meeting was held, who there furnished or provided drink or other entertainment for them, it was within the statute."

I do not see that the *North Wentworth Case* H. E. C., p. 343, referred to by the Chief Justice, has been reported on this point.

There are other cases in which there has been some discussion of the section: *North Victoria*, H. E. C. 252; *Halton ib.* 283 (in the headnote only so far as I can see); *North Ontario, ib.* 304, and *North Grey, ib.* 362.

Without attempting to lay down any inflexible rule for the circumstances of each particular case as regards the extent of the treating, the question must, in my opinion, always be whether the entertainment has been furnished to the meeting, that is to say, to the general body of electors composing such meeting, whether before, during,

or after the business of the meeting, and while, as a body, such electors remain together at the place of meeting or elsewhere. I think there is nothing in the cases really inconsistent with this proposition, and I take the *West Wellington Case* and the *North Wentworth Case* as referred to in the judgment of Draper, C. J., in the *East Peterborough Case* already cited, as illustrations of its application.

Or again, if there is continuous treating by an agent, of a few persons at a time, of those attending a meeting, so that, as it were, the meeting is treated in detachments there would be no difficulty in holding that to be within the section.

But where, as here, there is only the isolated case of four or five persons out of a large meeting retiring to another room during the meeting and treating each other, I think it impossible upon the most liberal construction of the section to say that there has been anything like a furnishing of entertainment to a meeting of electors.

There is another charge of treating a meeting by one Vanbridger. We have been referred to no evidence in support of it.

The next charge is that relating to the irregularities at polling subdivision No. 3, North Plantagenet.

It appears that some fifty illiterate voters voted at this subdivision, all of them being unable to read or write. Most, if not all of them, were personally known to the deputy returning officer.

Both candidates were present at the poll in this subdivision (section 193) and the usual declarations of secrecy were taken by all who were present.

Instead of taking from each illiterate voter a declaration in the form 23 referred to in section 100 of the Election Act, "that he was unable to read," the deputy returning officer, having first asked the voter whether he was able to read *or write*, and having received an answer in the negative, required him to put his mark to the declaration of illiteracy, explaining to him what he conceived to

be its effect thus, "you hereby sign that you are unable to read or write sufficiently to mark your ballot paper."

Therefore in forty-nine instances the deputy returning officer openly marked the ballot paper for the candidate named by the voter, in the presence of the candidates or their agents, the poll clerk and it is said a constable being also in the room. In one case the voter objected to vote openly, and said that he had signed the declaration under a misapprehension of its effect. A ballot paper was then given to him and he voted secretly.

This voter though unable to read or write, had, as the deputy returning officer said, some idea of letters, and could find out the day of the month in an almanac.

In three or four other instances the voters, after having signed the declaration, desired to have the ballot papers given them, and the names of the candidates shewn to them, so that they could retire and vote. This, the deputy returning officer declined to do, not considering it his duty.

The evidence does not support the precise allegation in the petition, the real objections being (1) That the deputy-returning officer inaccurately stated the effect of the declaration of illiteracy; (2) That he did not, before taking it, explain to the voter that if he made it he would not be permitted to vote secretly; (3) That secrecy of proceedings was not observed as fully as it might have been, inasmuch as the poll clerk and constable were allowed to be in the room when the ballots were marked. In other words, the contention is, that the deputy returning officer did not comply with the rules contained in the Act as to taking of the polls and the use of the forms, and (2) That the election was not conducted as regards secrecy of voting in accordance with the principles laid down in the Act: and it was argued that the election ought not to be saved under section 159 since the result, looking at the narrow majority obtained by the respondent, might have been affected by these so-called illegal practices in connection with the single act of corruption proved.

Section 197 of the Election Act provides that no election shall be declared invalid * * by reason of a non-compliance with the rules contained in the Act as to the taking of the poll * * or by reason of any mistake in the use of the forms contained in the schedules to the Act, if it appears (1) That the election was conducted in accordance with the principles laid down in the Act, and (2) That such non-compliance or mistake did not affect the result of the election.

I do not think it necessary to determine whether the default, omission, or misconduct of the deputy returning officer complained of is an "illegal practice" within the meaning of section 159, nor whether, if there had been to any considerable extent, a plain and open violation of the principle of secret voting, the election might not be set aside on the ground that there had been no true election.

I am of opinion that the only irregularity committed was that which I have already mentioned in connection with the declaration of illiteracy, and that substantially there was no violation of the principle of secret voting.

No doubt the deputy returning officer should merely have asked the voters if they were unable to read. Asking them if they were unable read or write might have led them to think that it was necessary that they should write the name of the candidate for whom they intended to vote, but as they were in fact unable to read and yet desired to vote, the conditions arose in which it became the duty of the deputy returning officer to take their declarations and to mark their ballots. He is nowhere required to explain that in such case they cannot vote in secret.

A mistake of that kind cannot, as it seems to me, be said even remotely to affect the result of the election.

Then, as to secrecy of voting. The Act draws, as I think, a clear distinction between the case of a literate and that of an illiterate voter. To the former the ballot paper is, after certain preliminaries, *delivered*: section 97. Upon receiving it from the deputy returning officer he is to "proceed into" one of the compartments provided for the purpose

and there mark it in accordance with the directions contained in form 13 in schedule A. Having done so he is to return it to the officer folded up in such a manner as to conceal from every one the name of the candidate for whom he has voted, and it is then, after having been identified, deposited in the ballot box.

Section 94 enacts that "the deputy returning officer shall take all necessary precautions for concealing, and shall conceal, as far as possible, from all persons present (including the poll clerk and agents, as well as other persons) the number printed upon the ballot paper *delivered* to any person, &c."

Section 95 enacts that "he *may*, and upon request shall, explain to the voter, as concisely as possible, the mode of voting, and the colours in which the names of the candidates are printed on the ballot paper."

An entirely different method of procedure is provided in the case of the illiterate voter, by the 100th section, which enacts—I quote only what is material to the present enquiry—that in case of any person claiming to be entitled to vote, who makes a declaration that he is unable to read "the proceedings shall be as follows": "The deputy returning officer shall, in the presence of the agents of the candidates, cause the vote of such person to be marked on a ballot paper in the manner *directed by* such person, and shall cause the same to be placed in the ballot box."

Reading this section with sections 94 and 95 and form 13, it seems plain that the latter only apply to the case of the literate voter who, with or without instructions as to the mode of voting, that is, the manner of marking the ballot paper, can mark it in entire secrecy.

With the illiterate voter on the other hand, secrecy, at least within the walls of the polling booth, is not attainable. It is deemed right that his ignorance should not deprive him of the franchise. Yet it would almost inevitably do so if he was left to mark a printed ballot in secret. Therefore he must in some way openly indicate by voice or gesture for whom he wishes to vote, and if he

makes the declaration of illiteracy the returning officer's duty is to proceed under section 100 in taking the vote. To guard against mistakes and avoid any imputation of unfairness, he is required to *mark* the ballot paper *in the presence* of the agents of the candidates by which I understand that they are, if present, to see him do so; but there is nothing in the Act which makes it necessary that he should withdraw with them and the voter to another room, or which forbids the polling clerk or other person lawfully present to remain there while the voter announces for whom he wishes to vote.

Such secrecy as is possible in the circumstances is provided for by the 146th section, which, under a severe penalty imposes the obligation upon every officer, clerk, and agent in attendance at the polling place. If it be urged that the illiterate voter is the one who most needs the protection of the ballot, the answer is, that the Act has expressly declined to extend it to him.

I may refer to the *Halton Case*, H. E. C. pp. 283, 386, where the deputy returning officer allowed the voter to state for whom he voted before taking from him the declaration of illiteracy.

I am of opinion that the votes in question were not improperly taken. That the election was, so far as appears conducted in accordance with the principles laid down in the Act, and that the mistake of the deputy returning officer did not affect the result.

The appeal should therefore be dismissed.

SPRAGGE, C. J. O.—I agree in the conclusion arrived at by my brother Osler, that the appeal of the petitioner to this Court should be dismissed, and I concur in what he has said in dealing with the different questions presented for our decision, with one exception. That exception is in relation to the taking of the votes of illiterate voters by one of the deputy returning officers, *i. e.*, in polling subdivision No. 3, in North Plantagenet.

My learned brother has described what took place on those occasions; and one cannot but be struck with the looseness and carelessness with which the deputy returning officer took these votes. The form of declaration given by the Act is as clear and simple as it is possible to be: "I A. B., of, &c., do hereby declare that I am unable to read." One would think it scarcely possible to go wrong in such a case; but this deputy returning officer was perverse enough to substitute something of his own: "You hereby *sign* (an absurdly inappropriate word) that you are unable to read or write sufficiently to mark your ballot paper." I think from the evidence that these illiterate voters were not misled by the form in which their votes were taken; but still the conduct of the returning officer does, in my judgment, call for, at least as much comment as I have made upon it.

In regard to the voting of this class of voters and of others referred to in section 100, viz.; those claiming to vote who are incapacitated by blindness or physical cause from marking their ballot papers, I cannot quite agree with my brother Osler that as to them the statute contemplates open public voting. The voting cannot, in their case, certainly be *as secret*, as in cases where the voter is able to read, and is not incapacitated otherwise from marking his ballot papers; but still it appears to me that it is the manifest policy of the Act that the voting shall in all cases, in those cases as well as in ordinary cases, be *as secret*, as under the circumstances, it can be.

Sections 94 and 97 cannot indeed be applied literally to the classes of voters referred to in section 100. Those deal with voters qualified by education, and not disqualified by anything from exercising the franchise intelligently. Any reason of policy in favor of their voting being given in secret applies with at least as much force to the classes enumerated in section 100 as to the rest of the voting community.

It was not necessary that any more than the three persons named in the Act, besides the voter himself should be

present; the deputy returning officer himself to take the vote; and one representative of each candidate to see that it was fairly and properly taken. The presence of any other persons was, as it appears to me, not in accordance with the spirit and policy of the Act; and should not have been permitted by the returning officer. That he had power to exclude all but those I have named by retiring with the voter and an agent of each candidate into a compartment, such as is provided for the use of ordinary voters, or in some other mode, can, I think, admit of no doubt; and that it was his duty to do so appears to me to be also clear. The statute might certainly have been more explicit, but I think he should have acted in accordance with its spirit, if in taking the votes of illiterate voters he had gone as far in the direction of taking them in secret as under the circumstances it was possible for him to do.

The taking of these votes in the way that they that they were taken was, I think, an impropriety, but the statute is not explicit as to who shall not be present in the taking of these votes, but only as to those who are to be present, and in what was done there was nothing done, or omitted to be done, that could avoid the election; even serious irregularities might occur without their having that effect. My brother Osler has quoted section 197 upon that point. They do not fall under the category of corrupt practices, or even of illegal acts, or of anything else which it is declared shall avoid an election. It is not necessary to decide whether an election may in any case be declared invalid by reason of any of the irregularities and omissions enumerated in that section, where it is found that the election was not conducted in accordance with the principles laid down in the Act; because the words used must mean that the election as a whole, taking it altogether, was not so conducted. It cannot mean that the election can only be saved from being avoided, in case it shall appear that in every instance and in every particular, the election was conducted in accordance with the principles of the Act. The first omission referred to is evi-

dence of this. The holding of a poll in every place appointed for that purpose, is really a matter of principle, inasmuch as the failure to hold it operates to the disfranchisement *pro hac vice* of the voters entitled to vote at that place, and yet the omission to do so does not *per se* avoid the election.

It must also appear that "such failure, non-compliance, or mistake," as is specified in this section, did not affect the result of the election; and that, I think, is shewn in this case. I do not think I can usefully add anything to what has been said by my brother Osler and by the *rota* Judges upon that point.

It is only upon the points that I have indicated that I at all dissent from what is said by my brother Osler in his judgment; and in that I express only my own individual opinion. I agree in his conclusion that the appeal should be dismissed, with costs.

BURTON, J.A.—I agree with my brother Osler in holding that the appeal should be dismissed and generally with his reasons for arriving at that conclusion.

I wish to add a few words with reference to the irregularities in taking the ballots. The point argued before us was really not that stated in the petition, which was in these words:

"9. That at the said election the deputy returning officer at polling sub-division No. 3 in the township of North Plantagenet, and the deputy returning officer at polling sub-division No. 2, township of Longueuil, irregularly, illegally and in violation of 'The Election Act of Ontario' did refuse to give ballot papers to a large number of duly qualified voters at said election, and compelled said voters to declare at the time of voting for whom they intended to vote and marked their ballot papers for said voters and counted said ballot papers instead of allowing said voters to mark their own ballot papers secretly as provided in said 'Election Act of Ontario,' whereby and by reason whereof said votes were and are illegal and void and should not have been counted."

And this is further borne out in the particulars, where the names of several voters are given as appearing on the voters' list as entitled to vote and whose votes were refused, but the learned counsel for the petitioner appears to have argued before the learned Judges on the *rota* as he did before this Court, not that any voter was really excluded from voting, but that by the mode adopted a certain number of illiterate voters were compelled to vote openly instead of secretly as the law requires, and that as the respondent was a person carrying on business in or near this particular polling sub-division, it may be inferred that these persons were thereby influenced to vote differently from what they would have done had the voting been secret.

The learned Judges have found, as a matter of fact, that there was no evidence which would justify them in finding that it had any influence upon their votes, and as I understand the evidence and the learned Judges' finding upon it that all these men were persons unable to read.

The deputy returning officer misinterpreted his duties under the Act in requiring the applicant to declare that he could neither read nor write, and in explaining to him that the paper he was signing was a declaration to the effect that he was unable to read or write sufficiently to mark his ballot paper.

Mr. Cameron contended that section 97 applied to all voters, literate and illiterate, but this is, I think, clearly not so. That whilst in the case of literate voters, the law carefully provides that whilst such a voter is in the balloting compartment for the purpose of marking his ballot paper, no other person shall be allowed to enter the compartment, or be in any position from which he can observe the mode in which the voter marks his ballot paper; it is equally careful in guarding the interests of an illiterate voter, or one incapacitated by blindness from marking his ballot, by providing that it shall be marked by the deputy returning officer, but in the presence of the agents of the candidates, so that no advantage may be

taken of him. The voting is necessarily in such a case open to this extent.

To have allowed these parties to retire to the compartment and mark their ballots as in the case of other voters, would have been a clear breach of duty on the part of the returning officer, and would have led to the very difficulty which the statute intended to avoid, viz., an unintelligent marking of the ballot. Nor do I conceive that in every such case it was intended that the returning officer and the candidates or their agents, should retire to the compartment for that purpose. Beyond the slight mistake made by the deputy returning officer in explaining the declaration, there appears to be nothing in the course pursued which was not warranted by the Act. There was no one present (if we except the constable who was in another part of the room), except the returning officer, the candidates and their agents, and the poll clerk, all of whom had taken the oath of secrecy.

It is obvious, I think, when we read section 197, that an irregularity of this nature, even if I am wrong in holding that what was done was regular and proper, cannot affect the election. The non-compliance with the rules contained in the Act, as to the taking of the poll, or the mistake in the use of forms requisite to have that effect, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and so extensive as to satisfy the tribunal trying the case, that it did affect the result of the election.

It has been observed that this section of the English Act which is similar in this respect to our own, is an enactment *ex abundante cautela* declaring that to be the law applicable to elections under the Ballot Act, which would have been the law to be applied if the section had not existed, and that it followed that for the same reasons which would prevent the Courts holding the election void at common law, it must hold it not void under the Statute: *Woodward v. Sarsons*, L. R. 10, C. P. 733.

The learned Judges have declared in most unmistakable terms that this irregularity did not affect the result, and there is nothing shewn to warrant us in interfering with that conclusion.

I agree, therefore, that the appeal should be dismissed.

HAGARTY, C. J., Q. B. D. concurred.

G. A. B.

WEST SIMCOE.

PROVINCIAL ELECTION.

BEFORE MR. JUSTICE PATTERSON AND MR. JUSTICE
FERGUSON.

BARRIE, *August 13th and 14th, 1883.*

BEFORE THE COURT OF APPEAL.

Present.—CHIEF JUSTICE SPRAGGE, MR. JUSTICE BURTON, MR. JUSTICE
MORRISON, MR. JUSTICE OSLER.

TORONTO, *September 19th, 1883.*
October 6th, 1883.

JAMES BEDFORD, *Petitioner*, v. ORSON J. PHELPS,
Respondent.

Form of petition—Charge included in particulars but not in petition—No power to amend petition—Treating—‘On account of being about to vote or having voted’—Agency—Speech by candidate at convention—Implied appointment of delegates as agents—Agent acting qua agent—Appellate Court—Selling liquor on polling day—R. S. O. ch. 10, secs. 153, 157, 158, 159, 161—R. S. O., ch. 11, sec. 2, sub-sec. 19, sec. 9, sec. 43.

The petitioner, in his particulars delivered herein, charged the respondent with giving or causing to be given meat, drink, and refreshment to voters on polling day on account of their having voted or being about to vote, being a corrupt practice under R. S. O. ch. 10, sec. 153. The petition itself, however, merely charged that the respondent “before, during, at, and after the said election, was by his agents and by other persons on his behalf guilty of corrupt practices as defined by the Controverted Elections Act of Ontario,” R. S. O. ch. 11, sec. 2.

Held (at the trial) that this form of petition was objectionable being hardly reconcilable with the intention of the Legislature in requiring petitioners to file an affidavit with the petition stating that they have reason to believe and do believe the statements contained in the petition to be true in substance and in fact, and, moreover, the charge being only by reference to a statute, the affidavit in such case could only be intelligently and honestly made by one who had informed himself of the provisions of the statute and applied to them some definite construction, and in any event the deponent would only be swearing to his

own construction of the statute, without stating what that construction was.

Held, further, that inasmuch as "corrupt practices," so far as defined at all by R. S. O. c. 11, were declared to mean "bribery, treating, and undue influence, or any of such offences, as defined by this or any other Act of the Legislature, or recognized by the common law of the Parliament of England," and also the violation of certain specific sections of R. S. O. ch. 10, among which sec. 153 was not included, and inasmuch as acts prohibited by sec. 153 were clearly not corrupt practices under the common law of Parliament, nor is there any definition of "treating" in any of the Acts of our Legislature, and therefore nothing to show that it covers offences under sec. 153, and therefore inasmuch as there might be extended upon the face of the petition every offence covered by the description or definition of corrupt practices contained in the Controverted Elections Act of Ontario, and yet there would not be amongst them any charge under sec. 153; therefore, the petitioner could not succeed in avoiding the election upon any charge under sec. 153, as he sought to do here, unless allowed to add it by way of amendment to his petition.

On the cross-appeal of the petitioner on this point no judgment was given the disposition of the respondent's appeal rendering it necessary to do so.

Held, further at the trial, that such amendment could not be allowed, for R. S. O. ch. 11, sec. 9, sufficiently shews that the Court has no jurisdiction to allow such an amendment, notwithstanding sec. 2, sub-sec. 1, and sec. 43, of that Act, as does also the requirement of an affidavit under sec. 11.

Maude v. Lowley, L. R. 9 C. P. 165, followed; *Re Election for the Electoral Division of the County of Monck*, H. E. C. 154, 32 U. C. R. 147, distinguished.

It appeared in the evidence that at the place of polling the respondent's firm had a house in connection with their mills, where their workmen were boarded, and where the respondent himself had rooms. A short time before the election, Mrs. B., who had formerly been housekeeper of the said house, had become tenant of it, or was allowed to occupy it, and have the use of the furniture, and was paid a certain sum per week or month for each man boarding there, and a sum per day for casual boarders, and she was in this position at the time of the election. On polling day, H., a nephew and partner of the respondent, who spent the day at the polling place, told voters that if they went to the said boarding house they could warm themselves and would find dinner if they wished it, and meat and drink was accordingly caused to be given to the voters at the boarding house by H., who was clearly the respondent's agent throughout.

Held, (at the trial) that the voters having come to the place for the purpose of voting, and that being their errand there, and the election being the occasion on which the provision was made and the hospitality extended to them, the act in question was done on account of each man so entertained 'having voted or being about to vote,' and in as much as it was impossible to say that the result may not have been affected by the above offer of hospitality, (R. S. O. ch. 10, sec. 159,) the election would have been void by reason thereof under sec. 158, had the matter been properly charged in the petition.

Held, however, that the evidence did not shew that the corrupt act was committed with the actual knowledge and consent of the respondent, and therefore he had not incurred the penal consequences of R. S. O. ch. 10, sec. 161.

The petition in this case further charged that one H., as agent of the respondent in violation of R. S. O. ch. 10, sec. 157, sold or gave drink at his tavern within the limits of a polling sub-division on polling day, which by R. S. O. ch. 11, sec. 2, sub-sec. 6, is made a "corrupt prac-

tice." It appeared that H. was present, and had acted as a delegate at the convention of representative Reformers, whereat the respondent was nominated. The latter did not undertake a personal canvass, or appoint any particular persons or associations of persons his agents for the purpose of carrying on the contest, but at the said convention he made a speech intimating that he expected his friends to work for him.

Held, at the trial and by the Court of Appeal, (BURTON, J. A., dissenting) that this constituted an appointment by him of every one of those who constituted the convention as his agent for the purpose of the contest, and no proof of acts done by the persons thus addressed and recognized by the candidate, was necessary to establish the agency, and as H. undoubtedly did sell the liquor as alleged, and as this corrupt act was not shewn to be of such trifling nature and extent as to come within R. S. O. ch. 10, sec. 159, the election must be declared void under sec. 158.

Per PATTERSON, J. A., and FERGUSON, J., (at the trial), the question of agency is one of fact, and must be decided in every case upon the circumstances immediately in question.

Per PATTERSON, J. A., and FERGUSON, J., the object and purpose of R. S. O., ch. 10, sec. 159, do not require anything in the shape of an attempt to estimate the number of votes which can be shewn or surmised to have been affected by the corrupt act in question, and to balance that against the actual majority. Although, no doubt, the word "trifling" must be construed in each case with some reference to the majority, particularly when considering the extent of the corrupt acts, the Court is not called upon to enter into a *quasi* scrutiny for the purposes of this section.

Per SPRAGGE, C. J. O.—When we find these two things concur, an act that comes within the designation "corrupt practice," and that the doer of the act is an agent for the candidate, we are not at liberty to say that the act was done in order to promote the objects of the agent, and not in order to promote the interest of the candidate, that, though true it is the act of the agent, it is not the act of the agent, *qua* agent. It being an act which is profitable to the doer of the act, and the making of the profit being assumed to be the motive of the doer of the act, cannot dissociate the act from the election.

The Lincoln Case, H. E. C. 391, commented on; *The Harwich Case*, 3 O'M. & H. 69, distinguished.

Per SPRAGGE, C. J. O.—The power of saving an election under R. S. O. ch. 10, sec. 159, should be exercised very cautiously, and *a fortiori* by the Judges of the Appellate Court where the rota Judges have deemed the case to be not proper for the application of the power given by this section of the Act.

No formal appointment or any particular words are necessary to constitute agency, and less positive evidence of appointment or recognition and adoption of a delegate to a party convention as an agent is required than in the case of one not a delegate.

Per BURTON, J. A.—Even if H.'s agency generally for canvassing and assisting in the elections were established in this case, he did not stand in the relation of agent in respect of the matter complained of. The only evidence was that he sold liquor for his own purpose under a mistaken idea that he had a right to do so, and there was nothing whatever to shew that it was done in connection with his character as agent. But in fact the words spoken by the respondent at the convention to the delegates did not constitute them his agents.

Per BURTON, J. A.—It is only for those acts of the agent which are done by him whilst acting or professing to act within the scope of his duties that the candidate is responsible. It is contrary to all principle to hold any person affected by the act of an agent, unless it is shewn that the act was done in the course of the employment, and within the scope of the authority, although it may be in abuse of it.

THIS was a petition presented under the Controverted Elections Act of Ontario, by James Bedford, in respect to the election for the electoral district of the West Riding of the county of Simcoe, held on February 27th, 1883.

The petition set out that the petitioner was a voter at the said election, in which Orson J. Phelps and George Moberly were the candidates, and Orson J. Phelps was declared duly elected: that the said Orson J. Phelps before, during, at, and after the said election was by himself and by his agents, and by other persons on his behalf, guilty of corrupt practices as defined by the Controverted Elections Act of Ontario: that several persons not entitled to vote voted for the said Phelps: that certain votes for the said Phelps were obtained for him by corrupt practices; and alleged other matters not necessary to mention here, and prayed that it might be determined that the said Phelps was not duly elected, and that the said Moberly was duly elected.

On June 5th, 1883, the petitioner was ordered to deliver particulars.

The remaining facts of the case and evidence adduced appear in the judgments.

The petition was tried at Barrie, on August 13th and 14th, 1883, before Patterson, J. A., and Ferguson, J.

McCarthy, Q. C., and *Strathy*, for the petitioner. Under section 153, R. S. O. ch. 10, no question of the intention arises: *The Bodmin Case*, 1 O'M. & H. 115, 122; Imp. 17-18 Vic. ch. 102, sec. 23; *The Wallingford Case*, 1 O'M. & H. 56; *The Lichfield Case*, ib., 22; *The North Victoria Case*, H. E. C., 671, 703, 705. The change in the boarding-house in September or October last, did not make Mrs. Beaton the proprietress of the place. She is still a servant, and the change is in the mode of payment. She could not have taken other lodgers to the exclusion of the mill hands of Phelps & Co. Could Phelps have been ignorant of what was going on? If he was cognisant of what was going on his status is affected. We refer to the

Taunton Case, 1 O'M. & H. 181 ; *The Blackburn Case*, ib., 198 ; *The North Ontario Case*, H. E. C., 304 ; *The North Wentworth Case*, ib., 343 ; *The Cornwall Case*, ib., 547 ; *The East Northumberland Case*, ib., 577 ; *The North Grey Case*, ib., 362 ; *The Niagara Case*, ib., 568.

Bethune, Q. C., and *Lount*, Q. C., for the respondent. As to Harber's acts, we dispute the agency. There is no evidence of his being a member of the association : *Welland Case*, H. E. C., 187. A committee finishes its duties when the nomination is made. It is clear, moreover, that what Harber did could not have affected the election. We say there has been no violation of section 153. The English cases do not tend to shew that the words, "on account, &c.," mean nothing : *The Bodmin Case*, 1 O'M. & H. 117 ; *The Tamworth Case*, 1 O'M. & H. 74 ; *The County of Louth Case*, 3 ib., 161. As to the dinners, they were not given on account of the voting. The dinners were given on account of good feeling for neighbours who were manifestly in need of refreshment. They were not given by Hammil, but by Mrs. Beaton ; and whatever was done was without the knowledge or consent of Phelps. See *The Glengarry Case*, H. E. C., 8 ; *The Kingston Case*, ib., p. 625 ; *The North Middlesex Case*, ib., 376 ; As to the desired amendment of the petition, it cannot be allowed. The time for filing a petition is limited. The power of amendment cannot be meant to be included by the section [R. S. O. ch. 11, sec. 2, (1,)] stating that the Court shall have the same power as on the trial of an "ordinary cause." What is being tried is the petition itself. Again, the affidavit cannot be amended. It is clear there is no jurisdiction to make such an amendment : *Maude v. Lowley*, L. R. 9 C. P. 165 ; *Aldridge v. Hurst*, 1 C. P. D. 410.

McCarthy, in reply. Such offences as that under sec. 153, are dealt with by the English cases as "treating : " *The Norwich Case*, 1 O'M. & H. 8 ; *The Cheltenham Case*, ib., 62 ; *The Wallingford Case*, ib., 56 ; *The Carrick-Fergus Case*, ib., 264 ; *The Bodmin Case*, ib., at p. 124.

Harber was at Stayner, and amongst others was requested to put his "shoulder to the wheel," &c. How he went there has nothing to do with the argument.

PATTERSON, J. A.—The petitioner, in giving particulars under the Judge's order, has stated as the first charge of corrupt practices, the giving or causing to be given meat, drink, and refreshment to voters on polling day, on account of their having voted or being about to vote. The names of several voters are given, and the charge is made against the respondent personally, as well as against persons alleged to have been his agents. This is a charge under section 153 of the Election Act.

At the trial it was objected that the offence is not charged in the petition. This was contested on the part of the petitioner, and we were also asked on his behalf to allow an amendment of the petition, if that were held to be necessary, to let in evidence of the charge. Without deciding the objection or dealing with the application to amend we heard the evidence of both parties. It appeared that at Phelpston, where the poll for polling sub-division No. 3, of the township of Flos was held, the respondent's firm had a house in connection with their mills, where their workmen were boarded, and where the respondent himself had rooms. The establishment had until recently been conducted for the firm by a house-keeper, but at the time of the election, and for a short time before that, it had been on a different footing. The former house-keeper, Mrs. Beaton, had become tenant of the house, or was allowed to occupy the house and to have the use of the furniture, to which she had added some more, and was in addition paid a certain amount per week or per month for each man boarding there, and a sum per day for casual boarders.

The poll was held in the office of the mills, which was a short distance from the boarding-house. There was a tavern in the village kept by one Marley. Mr. Hammil, a nephew of the respondent, was his partner, and

had the active charge of the business. On the polling day he was busy at poll No. 3, sometimes acting as scrutineer inside the office, and sometimes being outside seeing voters, arranging to have absent voters sent for, and generally doing what the emergency required. Amongst other things he hospitably announced to voters that if they would go to the boarding-house they could warm themselves and would find dinner if they wished for it, an invitation of which a number of voters availed themselves. There is some question, upon the evidence, as to who furnished the dinner. Mrs. Beaton says she did, and Mr. Hammil says so too. He says that when he went to the boarding-house to ask Mrs. Beaton to send lunch to the office for himself and the others who were engaged there—viz., the deputy returning-officer, the poll clerk, and the scrutineers of both candidates—Mrs. Beaton said to him that if there were any people there from a distance, he might tell them she would have dinner for them if they came, and he only conveyed her message. There had been polls held at two municipal elections at the same place, and on both occasions voters had received the same hospitable entertainment. Those elections had occurred while Mrs. Beaton was only house-keeper. The evidence leaves no doubt with us that the proper conclusion of fact is that the meat and drink were caused to be given to the voters who dined at the boarding-house by Mr. Hammil. We do not entirely adopt the account of how it was done given by Mrs. Beaton and Mr. Hammil. There are different circumstances, relating to the time when people were spoken to, and the hours when they found dinner ready or being prepared ; and there is the fact that the deputy-returning officer took upon himself, from whatever understanding he had, to be the mouthpiece for the invitation to some of the voters ; and there is the fact, which the evidence seems to show, that the invitation, as given, was not given as that of Mrs. Beaton ; and there are other considerations also, such as the absence of any attempt to show why the burden

should have been assumed by Mrs. Beaton, or allowed by her landlord to be so assumed; and the presence of plenty of evidence to support a claim, if she should make one, for payment for the provisions; all of which throw grave doubt upon the accuracy of Mr. Hammil's account of the matter. We hold that the entertainment was caused to be given by Hammil.

Nothing need be said as to Hammil's agency, although his agency all through the contest is abundantly proved, because on the occasion in question, the respondent who was himself part of the day at Phelpston, and actually voted at that poll, left everything to Hammil.

Then, was the entertainment given on account of the voters having voted, or being about to vote? The charge is not bribery or purchasing votes by the inducement of the dinner. No actual corruption, or corrupt offer addressed to the individual voter, is involved in the charge. It is merely an act which is made, under the circumstances, illegal, and as to which our Provincial Act goes further than the English law or that of the Dominion, by declaring it a corrupt practice. We have, therefore, to find for the words "on account of," &c., a significance which will satisfy the statute without doing violence to the language itself. We think that the voters, having come to the place for the purpose of voting, and that being their errand there, and the election being the occasion on which the provision was made and the hospitality extended to them, we must hold that the act was done on account of each man so entertained "having voted or being about to vote." It has been strongly argued that this act which is made by section 153 a corrupt practice has not been shown to have been committed with the knowledge and consent of Mr. Phelps himself. I confess it is a difficult matter to avoid a feeling of surprise that it could have escaped his knowledge. Yet it is the case that, however forcibly we might be inclined to think the evidence pointed to his knowledge and consent as the proper inference, it would after all be inference only. The only thing approaching

direct evidence on the point is that of two men—Hastings and Lavery—to the effect that they entered the dining-room when Mr. Phelps himself was at the table, and were told by him to sit down and help themselves. They do not quite agree in details, and were not very satisfactory witnesses, and they are contradicted by Mr. Phelps, not perhaps very decidedly as to the circumstance of his having seen them in the room, but as to the very material point of the time when they were there, as well as in some details, as *e. g.*, when Hastings says Phelps was taking his lunch when he and Lavery came in, whereas Mr. Phelps says he was ill and did not take lunch. But all they prove at most would be that he saw two men get meat who were not his men or regular boarders. The essential fact of the reason why it was given them would still be left to inference only.

Now, if the petitioner can maintain the giving by Hammil the agent, the election must be avoided under section 158, because it would be impossible to say, in order to bring in the saving effect of section 159, that the result may not have been affected by the offer of hospitality on the part of the respondent to all voters who came to that poll—for that was the character of the invitation—particularly when we are told that the respondent's whole majority in the riding was only 35, while the majority at this poll was 79. Therefore what would depend upon the personal charge against the respondent would be his disqualification under section 161. This is a result so highly penal in its character that we ought to be satisfied by very clear evidence before finding the charge established. We have, as against the inference we are asked to draw from the petitioner's evidence, the express denial of the respondent himself, supported by the evidence given by Mrs. Beaton; and there are circumstances to be considered on the same side—one of these is that in the early part of the day the respondent was not at Phelpston, only arriving there between eleven and twelve o'clock, which is the time fixed, if they fix any time, by Hastings and Lavery

when they say they found him finishing his lunch. Upon the whole we think we should be wrong if we decided upon this evidence that the corrupt act was committed with his knowledge and consent. Our finding will be that it was committed by his agent without his knowledge and consent.

Let us now consider the preliminary objection. First, we have to see what the petition alleges. The charge is "that the said Orson J. Phelps, before, during, at, and after the said election was, by himself and by his agents and by other persons on his behalf, guilty of corrupt practices, as defined by the "Controverted Elections Act." These are very sweeping words, hardly reconcilable, as it strikes me, with the intention of the legislature in requiring petitioners to file an affidavit with their petition, stating that they have reason to believe, and do believe, the statements contained in the petition to be true in substance and in fact. The circumstances must be very exceptional in which a petitioner can believe, upon reasonable grounds, that before, during, at, and after an election corrupt practices had been resorted to. Such circumstances may exist, but so far as we may be permitted to judge from evidence adduced before us, whatever grounds there may have been for referring corrupt practices to the day of the election, there was no justification for the affidavit so far as it related to the other periods. Another grave objection to this form of petition is suggested by the requirement of the affidavit. When the charge is made only by reference to a statute, in place of describing the acts or classes of acts attacked as corrupt practices, the affidavit cannot be intelligently and honestly made by one who has not informed himself of the provisions of the statute and applied to those provisions some definite construction, which is what few petitioners would claim to have done; and even if that were done the deponent would be swearing only to his own construction of the statute, without stating what that construction was. Whatever purpose the affidavit may have been intended to serve by way

of a check upon recklessness in making charges or in filing petitions, must be to a great extent, if not altogether, frustrated when this general form of charge is adopted.

We have, however, now to deal with the charge as we find it, and in order to understand its scope we must look at the definition of corrupt practices contained in the Controverted Elections Act. The reference intended is to sub-section 6 of section 2, of R. S. O. ch. 11, which contains a definition of the terms "Corrupt Practices," or "Corrupt Practice," as used throughout that Act. It is inaccurate to speak of the definition as a definition of corrupt practices; it is only a declaration that the term "Corrupt Practices," when employed elsewhere in that Act, shall have the meaning which the sub-section attributes to it. Strictly speaking the Act contains no definition of corrupt practices in the sense in which the petition uses the words. But without applying a criticism which may be objected to as too narrow, and regarding the class of practices, and not merely the term, as the subject of the definition, let us see what it embraces. It shall mean, the sub-section declares, "bribery, treating, and undue influence, or any of such offences, as defined by this or any other Act of the Legislature, or recognised by the common law of the Parliament of England; also any violation of the 151st, 154th, or 156th sections of the Election Act; and any violation of the 157th section of the last mentioned Act during the hours appointed for polling." Section 153 is not specifically mentioned; therefore if the acts which it forbids are embraced in the definition, we must find them covered by the terms "bribery, treating, and undue influence, or any of such offences, as defined by this or any Act of the legislature, or recognised by the common law of the Parliament of England." The definition is similar to that contained in the Imperial Parliamentary Elections Act, 1868, 31 & 32 Vic. ch. 125. It is not contended that the acts prohibited by section 153 were corrupt practices under the common

law of Parliament. Bribery is defined in the Election Act, R. S. O. ch. 10, sections 149 and 150, and embraces several things which at common law were not bribery. Undue influence has its definition in section 155. These sections do not declare the offences of bribery or undue influence to be corrupt practices. That stigma is in terms attached to them only by the interpretation clause which, in the Elections Act, is similar to that in the Controverted Elections Act, R. S. O. ch 10, sec. 2, (a) I do not know that any acts have been declared to constitute an offence called "treating" under the laws of this Province. The Dominion Elections Act, 1874, 37 Vic. ch. 9, following the Imperial Corrupt Practices Prevention Act, 1854, 17 & 18 Vic. ch. 102, sec. 4, contains in section 94 a declaration that a candidate who commits corrupt acts of the same character as those forbidden by our R. S. O. ch. 10, sec. 152—which represents 39 Vic. ch. 10, sec. 1—shall be deemed guilty of the offence of treating. Our Act does not so name the offence, but declares it to be a corrupt practice. The word "treating," therefore, would seem to have found its way into sub-section 6, of R. S. O. ch. 11, sec. 2, by inadvertently following the interpretation clause of the Imperial Act or of the Dominion Act, without considering that while treating is defined by the Acts of the Parliament of Great Britain and of Canada, it is not defined by an Act of the legislature of Ontario. But if we had a definition of treating similar to that contained in the Acts of the Parliaments, it would apply to our section 152 and not to 153. The force of the words "or any of such offences," does not extend the class "bribery, treating, and undue influence," it merely applies the term "corrupt practice" to any of those offences, having, as I understand it, nearly the same effect as the substitution of *or* for *and* would have, as if we read that "corrupt practice" shall mean bribery, treating, *or* undue

(a) See also 47 Vic. ch. 4, sec. 2. (O) and 49 Vic. ch. 3, sec. 1, (O).

influence, as defined, &c. As I construe the sub-section, we might extend upon the face of the petition every offence covered by the description, "bribery, treating, and undue influence, as defined," &c., without having amongst them any charge under section 153.

The petitioner, therefore, cannot succeed upon the charge under that section, unless he is now allowed to add it by way of amendment of his petition.

We are asked to allow the amendment under the power which is conferred by sub-sec. 1 of sec. 2 of R. S. O. ch. 11, the Controverted Elections Act. In that sub-section the expression "the Court," is to mean the Court of Appeal; and it is declared that that Court shall, subject to the provisions of the Act, "have the same powers, jurisdiction and authority with reference to an election petition and the proceedings thereon, as the Court of Queen's Bench and the clerk of the Crown and Pleas in that Court would have respectively if such petition were an ordinary cause within the jurisdiction of that Court." The Court of Appeal would, under this declaration, have power to amend, and under R. S. O. ch. 11, sec. 43, the judges trying the petition would like a Judge at *Nisi Prius* have the same power, unless there is something in the provisions of the Act to restrain it. Such a restrictive provision is contained in the 9th section, which requires the petition to be filed within twenty-one days after the return, unless it questions the return or election upon an allegation of corrupt practices, and specifically alleges a payment of money or other act of bribery to have been committed by the member or on his account, or with his privity, since the time of the return, in pursuance or in furtherance of such corrupt practices, in which case it may be presented at any time within twenty-eight days after the date of such payment or acts committed. I shall not attempt to elaborate the reasons for giving effect to this restriction as against the jurisdiction to allow the amendment, because it happens that in the case of *Maude v. Lowley*, L. R. 9 C. P., p. 165, the subject is very fully and very ably dealt with by the eminent Judges who decided:

that case, and who held that the jurisdiction now appealed to did not exist under the statute they were dealing with, which ours follows in all the particulars which now come in question. I shall read some passages from the judgments.

Lord Coleridge, C.J., said, at p. 171 : "I am of opinion that this rule should be made absolute, on the ground that the learned Judge had no jurisdiction to make the amendment. That is the only question before the Court, for, if it is a matter of discretion, we do not as a general rule interfere with what the Judge has done. I therefore for one would decline to express any opinion of what my brother Pollock decided as matter of discretion. I think the learned Baron had no discretion in the matter. This was a petition presented against the return of a councillor under the Corrupt Practices (Municipal elections) Act, 1872, 35-36 Vic. ch. 60. In dealing with it we must be governed entirely by the provisions of the statute. The statement in the petition, as it originally stood, was, that 'the said James Lowley did personally,' [or 'that the agents or agent of the said James Lowley did, with his knowledge and consent,'] 'retain and employ persons who were included in the register of said [north-ward] of the said borough as burgesses for payment and reward at the above election as canvassers for the purposes of the said election, whereby the election of said James Lowley was void.' The order of Pollock, B., was to enable the petitioners to add, in the 5th and 6th paragraphs, after the said 'ward' the words 'and other wards.' * * * Thus, there being, as I before observed, two classes of offences included within the words of section 7, the petition as presented specified one class, and as amended both classes. The question is whether the Court or a Judge had jurisdiction to make such an amendment as that. Subsection 5 of section 21, which deals with the jurisdiction of the Court, is as follows : 'The Superior Court shall, subject to the provisions of this Act have the same powers, jurisdiction, and authority with reference to an election

petition and the proceedings thereon as it would have if the petition were an ordinary cause within its jurisdiction.' It may be taken, therefore, that if not limited and restrained by the Act this Court would have power to amend the petition. But I am of opinion that the words, 'subject to the provisions of this Act,' do limit and restrain the power of the Court, and prevent the exercise of the jurisdiction sought to be exercised in this case. The second subsection of section 13 of the Act, which prescribes the time within which a petition shall be presented, enacts that 'a petition shall be presented within twenty-one days after the day on which the election was held, unless it complain of the election on the ground of corrupt practices, and specifically allege a payment of money or other reward to have been made or promised since the election by a person elected at the election, or on his account or with his privity, and in pursuance or furtherance of such corrupt practices, in which case it may be presented at any time within twenty-eight days after the date of the alleged payment or promise, whether or not any petition against such person has been previously presented or tried. The enactment is distinct that the petition must be presented within twenty-one days, except in the one specified case of an offence not discovered since the election, but which has taken place since the election; and in such case the petition may be presented at any time within twenty-eight days, not after the discovery of the offence, but from the taking place of that which constitutes the offence. That is extremely strong to shew the intention of the Legislature that, except in the specifically excepted case, the petition must be presented within twenty-one days after the day of the election. Then does the introduction of the additional allegation make this in effect a new petition? It is said that it is merely expanding and making more plain that which is already expressed. But that is not, in my opinion, a well-founded contention, because the petition as originally framed charges only one of the offences pointed out by section 7, and as amended it charges both. To allow such an amendment, therefore, would far

exceed the jurisdiction given by section 21, subsection 5. We are much indebted to Mr. Tennant for his very clear and able argument, in which he has brought to our notice other provisions of the Act which all tend to the same conclusion. He points to the provision that the petition, signed by the petitioner, shall be presented in the prescribed manner, and that the officer shall forthwith send a copy to the town clerk, and that the town clerk shall forthwith publish it, as affording a strong reason for contending that the Legislature contemplated that it should be once for all ascertained what the petition is, and that when once for all ascertained there should be no amendment. He also calls attention to subsection 3 of section 13, which requires the petitioner to give security for the costs of the petition, and suggests, and with great justice, that a surety may fairly say that, seeing one specific offence only charged, and being satisfied that that charge would be made out, he was content to enter into the recognizance; but that if the allegation in the petition is afterwards allowed to be altered, he may say that, if the charge had been so framed originally, he would not have consented to become such surety. That seems to me to be a just and well-grounded argument. The respondent has a right to know once for all within the twenty-one days what are the precise charges which he has to meet, and may then destroy any documents or vouchers he may possess that might have reference to any other charges. Mr. Tennant also pointed out that after the expiration of the twenty-one-days it would be too late for any one else to present a fresh petition; and that to allow a petitioner to amend so as substantially to make the amended petition a fresh one, would be conferring upon him a privilege which no other person could possess. That seems to me to dispose of the case."

Keating, J., shortly expressed his concurrence with Lord Coleridge. Denman, J., who had hesitated, explains that he had come to the same opinion; and Honyman, J., makes these observations: "I am of the same opinion.

There is nothing in the Act or in the rules framed in pursuance of it to warrant this amendment. The 7th section requires the petition to be presented within 21 days after the election. Here the petition was presented in time, charging the employment, as paid canvassers, of persons on the register of burgesses for the North ward of the borough. After the expiration of the 21 days the petitioners seek to add a new charge, viz.: The employment, as paid canvassers, of persons who are on the register of burgesses for other wards in the borough. I think that cannot be allowed. Suppose a petition to allege bribery only, could the petitioner be allowed afterwards to add a charge of treating? or, suppose a *qui tam* informer sues for one penalty, would he be allowed to amend by introducing two or three more? I entertain a strong opinion that no such authority exists."

We have also been referred to the case of *Aldridge v. Hurst*, 1 C. P. D. 410, where the same doctrine is held.

In addition to these reasons, which are entirely apposite to our statute, we have the requirement of the affidavit which must be filed with the petition, and therefore within the twenty-one days, and which cannot be made to apply to a charge not contained in the petition as filed.

We have been also referred to a case in our own Courts in which an amendment was made at the trial, similar in principle to that which, it is now urged, we have no jurisdiction to make. It is the case of the *Monck* election tried in 1871 before Mr. Justice Galt: H. E. C. 154. That learned Judge made the amendment, reserving amongst other questions for the Court of Queen's Bench, the question of the power of the Judge presiding at the trial to amend the petition. The decision of the Queen's Bench is reported in 32 U. C. R. at page 147. The power of the Judge was affirmed by the Court. I gather from reading the reports that the jurisdiction of the Court of Queen's Bench, as election Court, to amend, was assumed without question, by both the Court and the counsel engaged, attention not being called to the limitation of time, and to

the fact that the general powers of the Court, declared in the interpretation clause, were subject to the provisions of the Act, as they still are. The Act in question there was 34 Vic. ch. 3 (O.) The question reserved, and the only question considered on that branch of the case, was, whether the Judge at the trial had, under the 33rd section—which is now our section 43—the same power as a Judge at *nisi prius*, and I entirely agree with that construction of the statute without which my learned brother and myself could not probably engage in the present discussion; but I do not look upon the case as a decision of a question which was not mooted, viz.: the effect of the words “subject to the provisions of this Act.” Even if these words in the Act of 1871 had been then construed differently from the view we adopt of them as they appear in the Revised Statutes of Ontario, ch. 11, which statute contains, in sec. 11, the provision which originated in 1876—39 Vic., ch. 10, sec. 28—respecting the filing of the affidavit, the decision would not necessarily govern us. We are of opinion that we have no jurisdiction to allow the amendment.

We took time to consider another of the charges on which the petitioner seeks to avoid the election. It alleges that George Harber, an agent of the respondent, violated the 157th section of the Elections Act, R. S. O. ch. 10, by selling or giving spirituous or fermented liquors or strong drink at his tavern within the limits of polling sub-division No 1, of the township of Flos during the polling day and within the hours of polling, which by section 2, sub-section 6, of the Controverted Elections Act, R. S. O. ch. 11, is a corrupt practice. There is no doubt of the violation of the section. Harber kept a tavern a mile or upwards from the polling place, and having, as he says, the idea that the prohibition extended only to taverns within a mile, he kept his tavern open and sold liquor all the polling day just as he did on other days. One instance has been specifically proved, Harber himself having given a glass of spirits to one Kenny—but there is no difficulty in finding as a fact that

he must have sold or given many glasses. He ventures the estimate of \$10 as the amount of money probably taken over the bar that day.

Then, on the question of agency, I think we must also find for the petitioner. The respondent was nominated by a convention of persons who represented or assumed to represent the Reformers of the various municipalities in the riding. Harber acted as a delegate at that convention. He had acted in the same capacity at a convention held shortly before, when a gentleman was nominated as a candidate who afterwards withdrew, thus giving occasion to hold the second convention. Harber had not been very formally delegated to either of the conventions, but he attended at the request and with the recognition of some members of the party. The important fact is, that he was actually present and acting as a member of the convention which nominated the respondent.

There is no pretence that any means were arranged for carrying on the contest or that anything was depended upon except the exertions of those favourable to the respondent or his party. The respondent did not undertake a personal canvass, or appoint any particular persons or associations of persons, his agents for the purpose of carrying on the contest. He depended on his friends or the members of his party, and in the words which he addressed to the persons assembled at the convention, when he thanked them for his nomination, he intimated that he expected his friends to work for him. It is not necessary to consider at present how far his address to that convention might be treated as authorizing all those who were in the room to act as the agents of the speaker, the assembly then present comprising a number of persons who were not in any sense delegates, and who had taken no part in the nomination; still less need we discuss its effect as possibly capable of being used as evidence of the agency of others who may have belonged to the party, but who were not present. What we have here is a gathering of men who meet for the purpose of selecting a candidate as the representative

of their party, which is not quite the same thing as meeting as volunteers to concert measures for the assistance of one who is already in the field or who is offering himself as a candidate ; they select the respondent ; he may or may not accept their nomination ; he may decline as Mr. Patton had declined the nomination of the previous convention, or he may accept. He decides to accept, and tells those who have nominated him that he does so and hopes to win ; not because he undertakes to canvass the constituency and do the work which must be done ; not because he depends on any central or branch organisations to conduct the contest ; and not because he has any other machinery on which he depends ; but because he relies on the exertions of his friends. Primarily such words are addressed to the individuals by whose action he has been induced to become a candidate, and as whose affair, at least as much as his own, he treats the matter. In my opinion this is evidence which must be taken to prove the appointment by the candidate of every one of those who constituted the convention—and, as I have said, this is all the length we require at present to go—as his agent for the purpose of the contest. Proof of acts done by the person thus addressed is in my judgment, immaterial and unnecessary. The agency is created by the direct authority given. Evidence of acts done on behalf of a candidate is very important when the agency has to be inferred from proof of recognition by a candidate of what some one has assumed to do on his behalf. Such recognition is only evidence of prior authority, and here the prior authority is itself proved. The first act done by one so authorized must bind the candidate to the same extent as any later one of a series of acts. In the present case, however, there is evidence of Harber's taking an active part in the contest, if such evidence were required. One instance is given in Mr. Cooper's evidence respecting a meeting at Elmvale. There were also meetings at Harber's own house, though the evidence of any action of his in connection with them is vague ; and in the case of Lawrence Kenny his interference is very distinctly proved.

I do not think any useful purpose would be served by referring at any length to the decisions and dicta on the subject of agency in these election contests. The result of them all, and the principle to which we must always resort, I take to be that the question, which is one of fact, must be decided in every case upon the circumstances immediately in question; and the fact to be decided may be stated generally in the words of Martin, B. in the *Norwich Case*, 1 O'M. & H. 8, when he said: "Mr. Justice Blackburn, Mr. Justice Willes, and myself, unanimously came to the conclusion that any person authorized to canvass was an agent and it does not signify whether he was forbidden to bribe or not." I may, however, note the *Harwich Case*, *Tomline v. Tyler*. 44 L. T. N. S. 187, when Lush, J., made some instructive observations on the general question of agency, and with some reference to the circumstances of the candidate being invited by a committee to become their representative; and refer also to the judgment of Hawkins, J., in the *Salisbury Case*, 44 L. T. N. S. 193, as more recent expositions of the doctrine. In my opinion we must hold Harber to have been an agent of the respondent. It was argued before us in another case—the *Prescott Case* (a)—that a tavern-keeper who sells liquor for his own profit within the hours of polling does an act which is not within the scope of his agency, and, therefore, although he may come within the definition of an agent as fixed by the decisions under the Acts relating to elections, does not in this particular act as agent. That argument has not been addressed to us in the present case, perhaps because we held in the *Prescott Case* that the question was really concluded by the statute which, by declaring such selling a corrupt practice, declared in effect that it was done with reference to the election, and was therefore within the scope of the agency. The facts in this case may not afford so much room for the argument, because it cannot be said to appear that Harber sold only

(a) Reported *ante* p. 88.

for his own profit that day. The incident of Lawrence Kenny strongly suggests the contrary. Still, if it is desired to question in appeal the propriety of our ruling in the *Prescott Case*, we do not regard any deference to our opinion in this case as conceding the point. There has thus been established a corrupt practice committed by an agent of the respondent. This, although without the respondent's knowledge and consent, will avoid the election, unless it is saved by the 159th section of the Election Act, R. S. O. ch. 10. That section declares that "to prevent the expense and trouble of new elections when unnecessary and useless; in case of a corrupt act or acts being committed by an agent without the knowledge and consent of the candidate, if the corrupt act or acts was or were of such trifling nature, or was or were of such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been affected by such act or acts, either alone or in connection with other illegal practices at the election, such corrupt act or acts shall not avoid the election." The trifling nature or the trifling extent of the corrupt acts must in some way be shown. In most cases their nature and extent appear from the evidence by which their commission is proved, and nothing further on that head is required. Nothing of that sort appears in this case. We know that the whole majority for the successful candidate was only 35. We know that during the whole of the polling-day one of the safeguards against corruption provided by the legislature was disregarded. We know but little of what actually went on at that tavern that day, and for the purpose of the statute actual corruption need not be proven; but the little we do know embraces the Kenny affair, in which the resources of the tavern were clearly used by Harber on behalf of the respondent. The object and purpose of section 159 do not require anything in the shape of an attempt to estimate the number of votes which can be shown or surmised to have been affected by the corrupt act in question, and to balance that against the actual majority. We must keep in mind the

careful language of the section which confines its effect to cases where the acts are trifling in their nature or trifling in their extent. No doubt this word trifling must be construed in each case with some reference to the majority, particularly when considering the extent of the corrupt acts, but the Court is not called upon to enter into a *quasi* scrutiny for the purposes of this section.

We feel it impossible to say that the keeping open of a tavern for the purpose of selling and giving liquor during the hours of polling and the selling and giving during those hours, which we have to find as a fact—acts which the law stigmatizes as corrupt practices—were acts trifling in their nature or trifling in their extent. It may be equally impossible to say that they affected the result, but that is not the form of the question. We have to say that the result cannot have been affected or cannot be reasonably supposed to have been affected by them. We are unable to say this, and have therefore to hold that section 159 does not apply to save the election, but that it must be declared void.

The petitioner must have the general costs of the petition and trial, the respondent being entitled to the costs occasioned by those charges in the particulars on which he has succeeded.

FERGUSON, J., concurred.

PATTERSON, J., in the course of the judgment took occasion to remark on the way in which the petition had been got up, condemning it as very loose and unsatisfactory.

Bethune, Q. C., called attention to the fact that the most part of two days had been occupied in taking evidence on the cases sought to be added by amendment, and urged that of course the respondent would be entitled to expenses in regard to these.

PATTERSON, J., said the respondent would of course be entitled to expenses in all the cases in which the petitioner

had not succeeded. The petitioner had not succeeded in amending, and whatever expenses had been incurred by the respondent in regard to the cases which the Court had decided could not be added by amendment he would be entitled to.

FERGUSON, J., concurred.

The respondent appealed from the above judgment to the Court of Appeal, and the appeal was argued on September 19th, 1883.

Bethune, Q. C., Blake, Q. C., Lount, Q. C., and Johnston, for the respondent. The judgment appealed from turned on the *Harber* charges. The tavern was about a mile from the polling place, and only one single glass was proved to have been given. Now conceding Harber was an agent, would the fact of his keeping his tavern open be a corrupt practice within the meaning of the statute, unless done with reference to the election. The general result was not affected by the drink given to him by Harber. The sale of it was not necessarily a corrupt practice; *Davidson v. Ross*, 24 Gr. 22; *Ontario Bank v. Newton*, 19 C. P. 258. Corrupt practices mean or ought to be read as meaning something done with the view of influencing the election: see R. S. O. ch. 10, sec. 157, and *The Prescott Case*, H. E. C. 1. Was the act done by Harber in his character of agent, assuming that he was an agent? Is it attributable or is it necessary that it should be attributed to it? Must it be conclusively presumed (1) that the sale was a corrupt practice; (2) That it was done as agent? Must everything that an agent does illegally be attributed to that character? Take the case of an agent acting traitorously: *The Stafford Case*, 1 O'M. & H. 228. Should not the election at any rate be saved under section 159? We offer

an affidavit that what was sold only amounted to \$1.00. There is no evidence that liquor was given away, and none that other illegal practices were committed so far as this decision is concerned. The result cannot reasonably be supposed to have been affected : *The West Hastings Case* (2) H. E. C. 539. Even if it had been shewn that \$100 was expended during the day, it was not shewn that any one was affected by it. No votes were shewn to be affected. Under section 158, an election is not avoided unless the candidate is connected with the corrupt act either personally or by his agent. To constitute a man an agent either the candidate must set him in motion to do particular or general work, or else there must be ratification of the work done. Now, here there never was any connection between Harber and the respondent. Though the former attended, he was not a delegate to the convention. Suppose a small meeting of twenty persons, and the candidate tells them that he does not mean to canvass, but depends upon the exertion of his friends—relies upon his party—if committees are afterwards appointed, does not that limit the agency to these? We refer to *The Dungannon Election*, 3 O'M. & H. 101; *The Westbury Case*, ib., 78; *The Bodmin Case*, 1 O'M. & H. 117; *The London Case*, H. E. C. 214; *The Westminster Case*, 1 O'M. & H. 89; *The Windsor Case*, 2 O'M. & H. 88; *The Salisbury Case*, 4 O'M. & H. 21; *S. C.*, 44 L. T. N. S. 193; *The Harwich Case*, ib., 187; H. E. C. pp. 116, 117, 192, 364, 403. 220, 423, 425, 426, 669, 670; *The Glengarry Case*, ib., 8; *The Kingston Case*, ib., 624.

McCarthy, Q. C., for the petitioner. A tavern-keeper is prohibited from selling absolutely for the whole day. The case is covered by authority : *The North Wentworth Case*, H. E. C. 343; *The North Grey Case*, ib., 362; *The South Essex Case*, ib., 235; *The South Ontario Case*, ib., 420; *The Lincoln Case*, ib., 500; *The Welland Case*, ib., 187. The expressions used in some of the English cases do not apply here in the matter of agency, under the different system which prevails here of making the candidate the

nominee of the party, instead of the candidate putting himself forward for election. Harber was a delegate at the meetings. He was asked to work, and did work. He canvassed behind his bar. There was an antecedent authority and a subsequent acting upon it. The circumstances of the case shew that agency should be inferred from the practice now adopted of delegates' convention, etc: *The North Ontario Case*, H. E. C. 785; *The Cashel Case*, 1 O'M. & H. 286; *The North Ontario Case*, H. E. C. 305; *The Taunton Case*, 1 O'M. & H. 180; *The South Norfolk Case*, H. E. C. 660; *The Cornwall Case*, (3,) ib., 803; *The East Northumberland Case*, ib. 387; *The Blackburn Case*, 1 O'M. & H. 200; *The Harwich Case*, 3 O'M. & H. 61. A candidate may repudiate agents, and yet may derive benefit from their services without liability. *The Westbury Case*, 4 O'M. & H.; *The Bewdley Case*, 3 O'M. & H. 145; *The Boston Case*, ib., 151; *The Westminster Case*, 1 O'M. & H. 29. As to the effect upon the election, this is the necessary consequence, not a decision of the Judge upon any question of law or fact, and is not an appealable matter. As to an election being set aside for an act of bribery, see *The Lichfield Case*, 1 O'M. & H. 22. Here the corrupt act was not of a trifling nature, nor of a trifling extent. There was evidence of illegal acts besides those charged in the petition.

Bethune, in reply. Any other illegal practices cannot be relied on, because everything relied upon to defeat the election must be pleaded or given in the particulars: R. S. O. ch. 11, sec. 8. I wish to refer to *The Wigan Case*, 1 O'M. & H. 188; *The Barnstable Case*, 2 O'M. & H. 105; *The Cornwall Case*, H. E. C., p. 547.

October 6th, 1883. SPRAGGE, C. J. O.—I propose to address myself first to the question which has been discussed by Mr. Justice Gwynne in the *Lincoln Case*, reported in Mr. Hodgins's very useful collection of election cases, at p. 391, and upon appeal in the same case by the late Chief Justice Draper; which was discussed also in the *South Ontario*

Case, H. E. C. 420, and in other cases, and recently in the *Prescott Case*, (a).

The question as put by Mr. Justice Gwynne in the *Lincoln Case*, *supra*, was, whether the Act of 1873, 36 Vic. ch. 2, avoiding elections by reason of corrupt practice by the agent of a candidate as well as by the candidate himself, applied to section 66 of the Act of 1868, 32 Vic. ch. 21, (O.) the learned Judge holding, at p. 403, that the Act of 1873 was confined in its operation to acts which he describes thus: "Such acts as are done by the agent—I do not say within the scope of, but in the course of, or exercise of the agency, and in the pursuit of the object of the agency—acts done as specified in the 67th section of the Act of 1868, directly or indirectly by the candidate himself—some act done with a view to promoting in some way the objects of the principal, and not to extend to acts in which the principal is in no way concerned, and which are done not with any view to his interests, or to the object of the agency. Such acts," (he adds) "are, it is true, the acts of the person who is agent, but they are not the acts of the agent *qua* agent."

The section upon which the question arose stood thus in the Act of 1868, 32 Vic. ch. 21, sec. 66 (O.): "Every hotel, tavern, and shop, in which spirituous or fermented liquors or drinks are ordinarily sold, shall be closed during the day appointed for polling in the wards and municipalities in which the polls are held; and no spirituous or fermented liquors or drinks shall be sold or given to any person within the limits of such municipality during the said period, under a penalty of \$100 in every such case." This section was placed under the heading "keeping the peace and good order at elections," not under the head of "prevention of corrupt practices at elections." The latter is the heading of a group of clauses which follow the section that I have quoted.

In the *Lincoln Case*, H. E. C. 391, the tavern-keeper was not himself an agent of the candidate; but the

treating was by an agent ; and the learned Judge draws a distinction between the two cases. " If (he says, at p. 399,) a person who is a candidate choose to appoint as his agent a hotel or tavern-keeper, who has an independent interest of his own in violating the statute, and whose violation of it may, as it certainly might, lead to violence endangering the freedom of the election, it would be plainly proper that a candidate who appoints such a person as his agent should have his election avoided, if his agent should so conduct himself in plain contravention of the statute, and we should not stop to inquire whether the violation of the statute did or did not affect the election. It is sufficient that it was well calculated to do so."

The learned Chief Justice upon the appeal of the case, was of opinion that 32 Vic. ch. 21, sec. 66 (O.) applied to the case of an agent who was not himself the tavern-keeper ; the other learned Justices expressed no opinion upon the point, and the case went off upon another ground.

Between the Act of 1868, and the trial of the *Lincoln Case*, two statutes were passed, one in 1871, 34 Vic. ch. 3, (O.) the other in 1873, 36 Vic. ch. 2, (O.) in each of which there is a definition of what shall be meant by " corrupt practices," and in the latter Act it is provided that any violation of section 66 of the Act of 1868 during the hours appointed for polling shall be a corrupt practice, sec. 1.

The *Lincoln Case* was decided in 1875 ; and in the following year, in an Act passed February 10th of that year, 39 Vic. ch. 10, we find a clause, sec. 3, which is in express substitution for section 66 of the Act of 1868, and which is now re-enacted in the same terms in the R. S. O. ch. 10, sec. 157. It runs thus : " No spirituous or fermented liquor, or strong drink, shall be sold or given at any hotel, tavern, shop or other place within the limits of a polling district " (in the R. S. O. it is polling subdivision) " during the polling day therein, or any part thereof, under a penalty of one hundred dollars for every offence ; and the offender shall be subject to imprisonment not exceeding

six months, at the discretion of the Judge or Court, in default of payment of such fine," and the interpretation clause, R. S. O. ch. 11, sec. 2, sub-sec. 6, defines any violation of section 157 during polling hours to be a corrupt practice.

I have referred to these several statutes as indicating the mind of the Legislature, that the giving or selling of strong drink at taverns or shops during the polling day, and especially during polling hours, was a great evil; that it was, as put by Mr. Justice Gwynne, calculated to affect the election; that it required stringent legislation to correct the evil. The change of the class under which the offence was ranked in the Act of 1868, "keeping the peace and good order," to the heading "corrupt practices" in the Act of 1876, 39 Vic. ch. 16, is also significant.

To my mind, it is, indeed, more than significant. Section 158 of the Act now governing elections, R. S. O. ch. 10 does, in terms, avoid an election where any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, with the single exception, mentioned in section 159, which does not touch the general question. The words, "Corrupt Practice," used in section 158, must mean every act designated in the Act as a corrupt practice. So that when we find these two things concur, an act done that comes within the designation, and that the doer of the act is an agent for the candidate, we are not at liberty to say that the act was done in order to promote the objects of the agent, and not in order to promote the interest of the candidate, that, though true it is the act of the agent, it is not the act of the agent *qua* agent. I am quoting here the language of Mr. Justice Gwynne, applied to the circumstances of the case before him. There is nothing in his judgment to lead me to think that he would have applied it to a case circumstanced as is the one before us. I am unable to agree that it is applicable to either case. It is, I think, not improbable, though I do not know it as a matter of history, that the position taken by the learned Judge may have led to

the legislation of the following session which I have already noticed.

Mr. Bethune points to some inconveniences and as he puts it to some incongruities that would or might result in the interpretation put upon the Act by the rota Judges who tried the case. It can hardly be said in the face of the clear language of the statute, that the incongruities are such that the Legislature would not have meant what the statute has been interpreted to mean. I can understand that if these assumed incongruities had been put forward in debate as reasons against this legislation in the shape in which we find it, that the answer might have been: "What is suggested may possibly occur, but it is very improbable; no instance is shewn of its having occurred hitherto. The evil to be remedied is a very great one; the freedom and purity of elections have been affected by it. It is one of the shapes in which voters have been tempted to regard rather their passions and grosser appetites, than their duty as constituents of a representative body; and it is wise to make the prohibition general and comprehensive, even though it may possibly in some individual cases, work inconvenience or even hardship."

In the case put of authority given to canvass workmen, or a particular locality, the candidate restricts the agency, places a limit upon what would otherwise be a general agency, and as to everything outside of the particular limited agency he is a stranger. This is not analogous to a case of general agency, and the general agent doing acts which are corrupt election practices, such acts cannot be said to be unconnected with the election. The Legislature has stamped them with a character—they are prohibited—not as the law now stands, because dangerous to peace and good order, (though that may still be one reason) but because dangerous to the freedom and purity of elections. The making the act a corrupt practice necessarily implies this. It's being an act which is profitable to the doer of the act and the making of the profit being assumed to be the motive of the doer of the act, cannot dissociate the act from the

election. The Legislature, we are bound to assume, has seen that the act of selling liquors at such time and place as are prohibited, are or may be connected with the election then and there in progress; and has therefore made it a corrupt practice; and being at and during an election a corrupt election practice.

I think that the reasons weighing with the Legislature to give to these acts the designation and character which it does give to them are patent enough; but it is sufficient for me, that the Legislature has seen fit to give to them the designation and character that they have given to them, and I cannot feel myself at liberty to say that they are not acts of that character because they differ in some, or it might be in many respects, from other acts to which the Legislature has affixed the same name and character.

Further, I think it is impossible to say that selling liquor in a tavern or shop may not be in furtherance of the interest of a candidate, inasmuch as it may give opportunities to canvass with effect, and be an aid in furthering such canvass.

We may suppose the case of the absence of all prohibition. A candidate would readily see, and seeing, would, or some candidate would, seize the advantage of having tavern-keepers selling or giving liquor to voters on the day of election; and there is too much reason to believe that such acts would be in furtherance of the interest of the candidate who had made the tavern-keeper his election agent.

In my opinion the clause has been rightly interpreted by the rota Judges.

To come now to the question of agency. It appears from the evidence that the respondent was put forward as a candidate through the instrumentality of an organized body, called the Reform Association of the West Riding of Simcoe: the *modus operandi* being, that delegates to a convention were chosen by Reformers under what may be called the auspices of the Association, that the office of the delegates in convention was to select the candidate of the

party, and that the respondent was the choice of the delegates in convention. We see by numerous cases in Mr. Hodgins's collection that many candidates have been selected in that way, and that it has been a common practice for the delegates to become active promoters of the election of the candidate whom they have chosen, by canvassing for him and otherwise.

I do not mean to say that being delegates they are thereby constituted agents of the candidate, or that giving his candidature their active support afterwards has that effect. Strictly I take it that their duty is executed, and at an end upon their selection of a candidate ; and if afterwards they canvass for him, or give him their support otherwise, it may be of their own free will ; or it may be that they have been appointed to that duty by the Reform Association. There are several instances in England of canvassers and other election agents being appointed by and acting for similar political organizations, for whose acts the candidate was not held responsible, unless he made them his agents expressly or impliedly ; or ratified and adopted their acts. But at the same time we note the frequency of the change of the mere delegate to the active election agent ; how in practice the one follows upon the other. It requires, I apprehend, less positive evidence of appointment, or recognition and adoption than in the case of one not a delegate.

The case of *East Northumberland*, H. E. C. 387, appears to have proceeded upon that principle, and the language of Mr. Justice Lush in the *Harwich Case*, 3 O'M. & H. 69, proceeds upon the idea that agency may be inferred from the circumstances connected with the position of the parties, and their acts and conduct. A number of the leading residents of the borough had formed themselves into a permanent association, selected the respondent as their candidate, and invited him to become their representative ; and after the respondent had commenced his canvass, they continued to act on their own behalf, as they had done before, and assisted the respondent in his candi-

dature in furtherance of the interests of their party. It appeared that as to canvassing the borough the respondent had from the outset determined, and that he had made his determination known to the association, that his canvass in the borough should be a personal one; and that this determination was carried out. Mr. Justice Lush fastened upon this circumstance as rebutting the inference that he would otherwise have drawn from the other circumstances of the case. The report states him to have said that if nothing more had appeared than the facts just stated, as to the respondent's connection with the association, and if the respondent had not determined and made known his determination to the association that his canvass should be a personal one, there would have been strong *primâ facie* evidence of agency on the part of the whole association; but looking at the whole circumstances of the case, he held that only one of them, a solicitor whom he had directly appointed as his election agent, was in a proper and legal sense his agent.

In the case before us the question of agency does not depend upon any over nice distinctions. It is clear from the cases, and it is common sense, that no formal appointment, or any particular words are necessary to constitute agency. The language of many learned Judges might be quoted to this effect. In the *Dungannon Case*, 3 O'M. & H. 102, Baron Fitzgerald, speaking of such agency, says: "Whether it has any distinct reference to canvassing or anything of that kind, appears to me to be immaterial, but in some sense or another, he" (the alleged agent) "must be considered as entrusted by the candidate with the performance of some part of the business of the election which properly belongs to the candidate himself, though he is unable to perform it in many cases without somebody to aid him. But that entrusting may be made out not merely by an express appointment to the performance of some material duty in reference to the election, but may be made out by implication. The circumstances of each case may differ, but that implication ordinarily must arise

from the knowledge which it appears that the candidate has of the part which the person is taking in the election."

Quotations might be multiplied. Without multiplying them unnecessarily I may quote the language of Mr. Justice Grove, in the *Wakefield Case*, 2 O.M. & H. 100, evidently pointed at the contrivances resorted to by candidates in order to have the advantage of the assistance of others in furthering their election while escaping responsibility of their acts. After adverting to the wider scope given to the term agency in election matters, beyond that given to it in ordinary transactions, the learned Judge says at p. 103: "I think it well that I should say in this respect that here it is almost impossible for any Judge to lay down such exact definitions and limits as shall meet every particular case, and it is extremely important that the public should know that, because, were it otherwise, were I for instance on the present occasion, to pretend to lay down an exact definition of what constituted agency at an election, possibly in some other case that particular definition might be evaded, although what came to substantially the same thing might have taken place. Happily there is sufficient elasticity in the law to prevent that being the case; and here again those who think that they can evade the law by just creeping out of the words which learned Judges use, or even which tribunals use, upon a matter of this sort, which is partly law and partly fact, will generally find that they are very much mistaken. It is therefore well that it should be understood that it rests with the Judge, not misapplying or straining the law, but applying the principles of the law to changed states of facts, to form his opinion as to whether there has or has not been what constitutes agency in these election matters. It is well that the public should know that they cannot evade the difficulty by merely getting, as they suppose, out of the technical meaning of certain words and phrases."

The plaintiff's case is, that at the convention at which the respondent was nominated he constituted the delegates

by whom he was nominated his agents, if he did not constitute all present his election agents. What took place on that occasion was shortly this. The delegates assembled in convention having selected the respondent as the candidate of the party, he was sent for in order to his formally receiving the nomination at the hands of the convention. Upon his appearing before the convention he was informed by the chairman of his nomination, and he accepted it, and, as Mr. Cooper says, he thanked the meeting for giving him the nomination. Mr. Cooper is asked: "Did he say he would go to work and do all he could to secure the election, and ask you to do the same" in substance? His answer is, "I cannot say, I guess he used words to that effect; it would be curious if he did not do so." It appears from his own evidence that in accepting the nomination, he said in substance that he could not personally canvass the whole riding, and asked those whom he addressed to work for him. I may here notice the fact that he did personally canvass only one township, leaving it to others to canvass the rest of the riding. At the election trial a number of questions were asked of him in order to get from him whom it was that he addressed when asking others to work for him. His answers do not read as if given in a direct, straightforward manner, but I gather from his own evidence that he addressed the request to the delegates. The whole number of persons present on the occasion he estimated at two or three hundred. It was put to him "these two or three hundred were not delegates," his answer is, "I don't suppose they were." It is then put to him, "the delegates were separated from the others," his answer is, "I would naturally suppose so." Question, "And that was the habit." Answer, "I suppose so." * * Question. "The delegates were separated from those who were not delegates?" Answer. "That is always the practice."

There is more evidence substantially to the same effect. It amounts to this, that the respondent on being nominated by the convention of delegates, thanked them for the

nomination, and added something more. The thanks were, of course, for the nomination, to the nominators; to whom was the something more addressed? It would naturally be addressed to the same body of men, and there is nothing to shew that it was addressed to others.

If in the *Harwich Case*, 3 O'M. & H. 69, the respondent in accepting the nomination had addressed those who nominated him in similar terms to those used by the respondent in this case, it is certain from what was said by Mr. Justice Lush, that he would have held the relation of agency established. In that case the respondent stated his determination to make a personal canvass, and asked no one to work for him. In this case the respondent said he could not make a personal canvass, giving that as a reason for asking others to work for him. Those whom he so asked (*i. e.*, the delegates, as I read the evidence) he constituted his agents for the election, within the meaning of the cases in England and in this country. I will only add to the authorities to which I have already referred, what was said by Baron Martin in the *Norwich Case*, 1 O'M. & H. at p. 10: "Mr. Justice Blackburn, Mr. Justice Willes, and myself unanimously came to the conclusion that any person authorized to canvass was an agent, and it does not signify whether he has been forbidden to bribe or not."

The next question is, was Harber a delegate to this convention? He was present as a delegate at the convention at which the respondent was nominated, and present when the nomination was made, when it was tendered to the respondent and accepted by him. He was, therefore, one of those to whom the respondent addressed his thanks, and his request that those whom he addressed would work for him. I do not think it is for us to inquire whether he was duly elected. He says in his evidence that he was elected. His election does not appear to have been questioned at the time, he was recognized as a delegate and acted as such in the convention. He was a delegate *de facto*, and that is sufficient for the purpose in question.

I think it would be running counter to the English decisions, as well as to those of Ontario, and to the spirit of the election law here as well as there, not to hold Harber an agent of the respondent.

Apart then from section 159, the acts of Harber in selling liquor in his tavern during election hours, and in giving liquor to Laurence Kenny, also during election hours, were corrupt practices, sufficient to avoid the election.

The evil to be remedied by section 159—taking the avoidance of an election, and the cost and turmoil of a new election upon trifling grounds to be an evil, was what occurred perhaps not unfrequently; that for some single unimportant act by an agent, done perhaps in ignorance of the law, the election was necessarily avoided. The Judges trying the election petition might feel convinced that the act had no effect whatever upon the result of the election and yet have no alternative, and be obliged to set it aside. This provision of the Act enables the Judges in such a case to say, "This act of the respondent's agent was committed without the knowledge or consent of the respondent himself; and though in strictness a corrupt practice as defined by the Election Act, it was of so trifling a nature, and in its extent also so trifling, that the result of the election cannot in reason be supposed to have been affected by it. It will be unreasonable therefore to set the election aside and put the candidates and the constituency to the expense and trouble of a new election, which in our judgment is unnecessary and useless, and therefore we do not avoid the election." In what I have said I have paraphrased the section.

Probably all the election Judges have had before them cases, before this clause was embodied into the election law, in which they would have been glad to have been able to deal with them as this section of the Act enables Judges to deal with them. But at the same time one cannot but feel that the power given should be exercised very cautiously. This should be the case with the Judges of first instance; and a fortiori with the Judges of this

Court, where the rota Judges have deemed the case to be not proper for the application of the power given by this section of the Act. We, in this Court, hearing the case upon appeal, cannot be such good judges of the extent to which the result of the election may have been affected by the "corrupt practice" in question, especially when we take into account that what is to be looked at is, not only the effect upon the election of a certain act or acts, but the effect of these acts, "either alone or in connection with other illegal practices at the election." The whole course of the election, acts illegal, but not "corrupt practices," within the meaning of the Act, the weight to be given to the evidence of witnesses, and to circumstances, and their probable or even possible bearing upon the results of all these things the Judges before whom all these things passed, or were disclosed in evidence, are better Judges than we can be. The majority of the respondent, thirty-five, in a constituency in which between three and four thousand voted, was an element of consideration for the rota Judges. Where the majority is an overwhelming one it is, of course less likely that the result would be affected by an act or acts trifling in their nature or extent.

My brother Patterson, by whom the judgment of the rota Judges was delivered, gives their reasons for holding the case not within the 159th section, and in the soundness of those reasons I concur; but were I less impressed with those reasons than I am I should not dissent from the conclusion at which the rota Judges have arrived, unless in my judgment they were clearly wrong. They put it thus, that it may be impossible to say that the acts in question affected the result, but they add, and I agree with them, "that is not the form of the question. We have to say that the result cannot have been affected, or cannot be reasonably supposed to have been affected by them—we are unable to say this." There is nothing before us that enables us to say that in this they have come to a wrong conclusion.

It is not really necessary to say anything about the character of Harber's act in giving of whiskey to Lawrence Kenny, but, what appears in evidence in relation to it tends to shew the propriety of the refusal of the rota Judges to bring the case within section 159. It was not an act of innocent hospitality but, as I think the evidence shews, an act in aid of a scheme by a supporter of the respondent to enveigle Kenny into Harber's tavern, and transfer him from the possession, so to call it, of a supporter of Mr. Moberly, in whose vehicle he was sitting for the purpose of being conveyed to the polls, to the position of a supporter of the respondent in whose vehicle he was conveyed to the poll. It is difficult, in view of this circumstance, to say that the selling of liquor by Harber in his tavern during prohibited hours was an act of a trifling nature, or that it was of such trifling extent that the result cannot be supposed to have been affected by it. I say during prohibited hours because his tavern was during those hours open for the sale of liquor, and he did take in on that day as much (to take his own estimate), as \$10, but it was an illegal act throughout the day, and therefore proper to be taken into account in saying whether the case should be brought within the section. And we see from the part that Harber took in the Lawrence Kenny matter, that he was a man not unlikely to improve the opportunities which his open house and selling of liquor would afford him in influencing the votes of those brought by his illegal act within the sphere of his influence. I do not see that the Judges could properly shut their eyes to that fact with whatever purpose the evidence was given.

Upon the whole my opinion is that the appeal should be dismissed.

BURTON, J. A.—I do not consider it necessary to offer any opinion upon the question of whether the facts and circumstances relied on in this case are or are not sufficient to establish agency, nor upon the other points referred to

on the argument, because I have come to a very clear conclusion, that even if agency were established, the wrongdoer did not stand in the relation of agent in respect of the matter complained of.

I shall not attempt any exact definition of what constitutes agency in election matters. Judges have over and over again declared that it is impossible to lay down such exact definitions and limits as shall meet every particular case. A much wider scope has been necessarily given to the term in election matters than in ordinary transactions, and it may be laid down generally, that a candidate is responsible for the misdeeds of those who are employed by him, or who to his knowledge, for the purpose of promoting his election, canvass or do such other acts as may tend to promote his election, but then they must, I apprehend, be misdeeds of these persons while acting within the scope of their duty and only while so acting.

Being an agent to canvass for and to promote generally the election of the candidate, the latter is undoubtedly responsible for bribery and other corrupt acts done with the view to accomplish that end, and I apprehend that the furnishing entertainment to a meeting of electors assembled for the purpose of promoting the election, which, though frequently an innocent act in itself, was for reasons of policy made at first an illegal act, and has now been declared to be a corrupt practice, might, if done by an agent, well be deemed to be a matter which would affect the candidate as well as himself, being an act to further the object for which he was appointed.

The question is thus dealt with by Mr. Justice Lush, in the *Harwich Case*, 44 L. T. N. S. at p. 189, 2 O'M. & H. 69: "As I observed a day or two ago the relation between a candidate and a person whom he constitutes his agent, is much more intimate than that which subsists between an ordinary principal and agent. The closest analogy is, that of a sheriff and his under-sheriff and bailiffs. For as regards the seat, the candidate is responsible for all the *misdeeds of his agent committed within the scope of his*

authority, although they were done against his express directions, and even in wilful defiance of them. * * The difficulty always is, when there is no express appointment to determine whether the wrong-doer did or did not stand in the relation of agent to the candidate *in respect of the particular matter of complaint*. * * The next question is, if agent, what is he agent for, what is he appointed to do, or what does he profess to do? If a person were appointed or accepted as agent for canvassing generally, and he were to bribe or treat any voter, the candidate would lose his seat. But if he was employed or accepted to canvass a particular class—as if a master were asked to canvass his workmen, and he went out of his way and bribed a person who was not his workman the candidate would not be responsible, because this was not within the scope of his authority.”

In the one case the agent would be acting within the scope of his authority, though in abuse of it; in the other he would be acting beyond his authority, and would be no more to the candidate than a stranger.

Again, in the *Westbury Case*, 3 O'M. & H. 78, the same learned Judge dealt again with the question of agency.

It was proved there that there was in the borough an association attached to the Conservative cause who voluntarily assembled together to promote their own political views. They sent a requisition to the candidate asking him to become their representative, whereupon he attended some of their meetings in order to expound his political views.

They did not become his committee, and as a matter of fact he had no committee. An endeavour was made to render him responsible for acts of bribery of some of the members of this association inasmuch as it was contended, he had made them agents by recognition and acceptance of their services. The learned Judge held the candidate not responsible, repeating what he had said in the *Harwich Case*, *supra*, and concluded at p. 80, “of course it follows that if a person whom the candidate had not authorized to

canvass at all or to take such part in the management of an election as included canvassing, whatever else he was employed to do, were to take upon himself to bribe a voter, the candidate would not be responsible for that wrongful act. No candidate could ever make sure of a seat if he were made responsible for the acts of unauthorized persons."

A text writer on the subject of election petitions, (Cunningham's Law of Elections, 2nd ed. p. 219) thus refers to the *Tamworth Case*, 1 O'M. & H. 75, where it was laid down that a person who employs private police for the purpose of the election, would be answerable for their acts as his servants: "Probably the meaning of the decision in the *Tamworth Case* is, that the candidate would be liable for any illegal acts done by private police, while acting as such, according to the line of duty marked out for them; and doubtless, if while or in the course of discharging such duties, an act of intimidation were committed, the candidate would probably be responsible for it just as much as if it were done by an agent. As, however, an act of bribery or corrupt treating could scarcely be brought within the scope of such a person's duties, as an act of intimidation might easily be, he would not render the candidate liable for it as his agent."

I refer to these cases as shewing that although the candidate cannot relieve himself from responsibility so far as the seat is concerned for the acts of his agent, though done without his consent or even contrary to his express instructions, still it is only for those acts of the agent which are done by him whilst acting or professing to act within the scope of his duties that the candidate is responsible.

Mr. Justice Lush, in the judgment I have above quoted, 44 L.T.N.S. at p. 189, says: "That the closest analogy is that of the liability of a sheriff for the acts of his bailiffs, his liability extends to all acts, however wrongful, and although against the sheriff's express instructions, but with this limitation however that they must be done under color of the writ."

As it is put in one of the cases, if a bailiff having a writ for the arrest of one person, were to arrest four, the sheriff would not be liable, although he would clearly be liable if the bailiff having an execution against A. were to seize the goods of B. ; but where the bailiff having made a seizure of a defendant's goods beyond the value of the sum endorsed on the writ, proceeded with the privity of the plaintiff to sell the whole, the sheriff was held not liable for the goods sold after sufficient had been made to satisfy the execution.

In the *King's Lynn Case*, 1 O'M. & H. 207, it was attempted to make the candidate responsible for statements made by his agent, but Baron Martin, in delivering judgment used this language: "The act of an agent is evidence against a respondent, but speaking generally, it is confined to that, though it is possible that he may be such an agent as to make his statements evidence also. But clearly you cannot make use of a statement made by an agent, upon a matter with which the agency is not connected, which is really nothing more than hearsay."

So in the *Salford Case*, 1 O'M. & H. 132, a sum of money paid after the termination of the election by a person who had been agent for the candidate, to a voter on account of his having voted, though a corrupt practice on the part of the agent, if done without the privity of the candidate, was held not to affect him.

It appears to me to be contrary to all principle to hold any person affected by the act of an agent, unless it is shewn that the act was done in the course of the employment, and within the scope of the authority, although it may be in abuse of it.

We can derive but little assistance from the decisions under the English Acts, because there the corrupt acts for the doing of which by the agent the principal has been held responsible, are all necessarily connected with the work of canvassing, and conducting the election or otherwise aiding the candidate in the promotion of his election ; he therefore is acting within the scope of the authority given to him, in a sense he is professing to act as agent,

though in so acting he does something which is in excess of that authority, but is done to further the object for which he was appointed.

The difficulty in construing our statute arises from the fact that certain acts which were prohibited, and made illegal, because it was assumed that they might have a tendency to disturb the peace, have been made corrupt practices, instead of having the same penal consequences attached to them as attach to corrupt practices, which probably would have been a more reasonable way of dealing with them, if it was thought desirable to impose additional penalties for the more rigid enforcement of these provisions.

The question in this case arises under R. S. O. ch. 10, sec. 157, which was, as I have said, passed originally with the design of preserving peace and order on polling day, and with this object the tavern-keeper who kept his hotel open, and sold or gave spirituous liquors to any one on that day, was subjected to certain penalties.

The Act 36 Vict. ch. 2 (O.), provided *inter alia* that any violation of this section during the hours appointed for polling should be included in the words "corrupt practices."

As pointed out in the *Lincoln Case*, H. E. C. 391, the amending law (39 Vic. ch. 10) effected no very material change, the leading idea being that liquor kept for sale at hotels, taverns, shops or other places where liquor is usually sold, shall not be dispensed on polling day, either by selling or under the pretence of giving, but that the offender, the person to violate it was the tavern-keeper, or the person for the time being acting in that capacity.

The person who can be proceeded against for a violation of this section is still as under the former law, the tavern-keeper or his locum tenens, and he is so liable though the person to whom liquor is sold or given is not a voter or in any way connected with the election.

Of course if it had been shewn that liquor had been sold, or given by the tavern-keeper, he being an agent, to any voter on account of such voter being

about to vote, or having voted, that would be a corrupt practice involving the candidate as well as the tavern-keeper, as it would be an act presumably done in the exercise of the authority given to him, but that is not the case here made. We must assume in a case of this kind that the evidence given is all that could be given of the transaction, and that being so we are called upon to say whether a simple violation of the 157th section by the tavern-keeper by selling or giving spirituous liquor within polling hours, which is a corrupt act on the part of the tavern-keeper involves the candidate, because the tavern-keeper is his agent generally for canvassing and assisting him in the election.

The learned Judges at the trial held that the question was really concluded by the statute, which by declaring such selling to be a corrupt practice, declared in effect that it was done in reference to the election, and was therefore within the scope of the agency.

Whilst concurring in the opinion of those learned Judges as to the effect of the statute in making this a corrupt practice, though done without any corrupt intent, I submit with great deference that a question of fact still remains for consideration—viz., whether in doing the act he did so as agent.

I have already pointed out a number of instances in which the particular act complained of, would affect the agent only and not the candidate, as where there is a limitation on the agency ; but we can imagine a case in which the agent being a tavern-keeper, has in good faith scrupulously avoided any act by which his principal could be affected or the election avoided, but has nevertheless determined to run the risk personally of keeping his house open on polling day for his own profit, or of doing so as is alleged in the present case, purely for his own purposes, and under a *bonâ fide* belief that he did not come within the prohibition ; if these facts are clearly established to the satisfaction of this Court,—he is unquestionably guilty of a corrupt practice within the meaning of the

statute and liable to the penalty. As in Shylock's case : "The law hath given it and the Court awards it ;" but is there any reason why we should do violence to a well established principle, and hold a person liable for the act of a third party done without his authority, and whilst not pursuing or engaged in his principal's employment, unless compelled to do so by the words of the Acts of Parliament.

I see nothing in the Acts to force us to such a conclusion, and I am most unwilling to add this additional responsibility to that already imposed upon a candidate for the acts of his agent, which must operate frequently with great hardship upon the persons thus situated. I quite agree that he cannot guard himself against the consequences of the acts of agents, if once they are proved to be agents, by swearing, even though he may convince the Court that he is swearing truly that he never intended that anything illegal should be done. The question is, what authority did he give, and did the acts of the person so authorized, legal or illegal, naturally follow the authority which was given: *The Sligo Case*, 1 O'M. & H. 300. If they did he must suffer, but if the act was entirely outside of and unconnected with the agency, I fail to see the justice or policy of throwing the additional burden upon people who are fairly conducting their canvass and exposing the constituency to the turmoil and trouble of a fresh election.

In the several cases to which I have referred, and in the English cases the candidate has been made responsible because in carrying out the authorized acts he had committed the wrongful act.

I do not for a moment question that if this man had given liquor to a voter to induce him to vote that the candidate would suffer, because the act, though illegal, would be done in carrying out the object for which he was appointed agent. Kenny's case may or may not have been of that character, but it was not included in the particulars, and was not investigated, but where as here nothing more is shown in reference to the transaction than that the hotel

keeper opened his hotel and disposed of spirituous liquors in the usual course of business, how can it be inferred that he did so otherwise than for his own profit? No amount of evidence, said the late Mr. Justice Willes, ought to induce a judicial tribunal to act upon mere suspicion, or to imagine the existence of evidence which might have been given by the petitioner, but which he has not thought it his interest actually to bring forward, and to act upon that and not upon the evidence which actually has been brought forward. Here the only evidence is that this man did it for his own purpose under a mistaken idea that he had a right to do so, and there is nothing whatever to show that this was done in connection with his character of agent. Although the responsibility of a principal for his agent's acts under the election laws is of necessity far wider than in ordinary cases, it is necessary even in these cases in some way to shew that the act was done in pursuance, though in excess of the actual authority; there is no difficulty in shewing this in cases of bribery and offences of a similar character; but it is not because in other cases it may be attended with more difficulty that it is to be assumed without evidence.

It is fair, I think, in considering a question under this section to look at the history of the legislation, and we then see that it was originally passed altogether with a different object than that which relates to corrupt practices aiming at the suppression of bribery, corrupt treating, and similar offences.

In the present case there is nothing to shew that the act was done otherwise than for the private gain of the tavern-keeper, solely on his own account, and without reference in any way to his position as agent. To hold the candidate liable for such an act would be, in my opinion, opposed both to principle and authority and would extend the responsibility of a candidate for the acts of persons acting as his agents far beyond what was ever intended, would be making him liable in fact for acts which had no connection with the agency, a conclusion I venture to think, unsound in law.

I am very clearly of opinion that he cannot be affected by such an act, although it was on the part of the tavern-keeper himself a corrupt practice, and I regret that the other members of the Court feel themselves unable to come to the same conclusion, for the avoidance of an election on such grounds shocks one's sense of justice and must have a tendency to weaken, rather than strengthen, the public confidence in the generally very wholesome laws which have been passed for attaining purity in elections.

I think that on these grounds the appeal should be allowed, and the judgment reversed with costs.

In this view of the case, I have not thought it necessary to enter into any analysis of the evidence as to agency, but I desire to express my dissent from the view that the words said to have been addressed to the delegates at the meeting at which the candidate was nominated, viz.: "that he should have to rely on his friends," constituted either the delegates assembled or his supporters generally his agents during the contest, although I am clear that if they could be interpreted as granting any authority it could not be limited to the persons there assembled, but would equally extend to all parties supporting him during the contest, and thus stated it seems to involve a *reductio ad absurdum*. He certainly never could have intended, and the persons who read or heard his words could not have supposed that he intended, to confer any authority on them to act as agents.

As I understand the evidence, the delegates were selected for the purpose of uniting upon a candidate who would be generally acceptable to the party whose political views he was supposed to represent—the selection once made and accepted, their duties and powers were at an end, and I am unable, I confess, to see the distinction between such a case, and one in which a person unsolicited issues an address to the electors announcing his intention to offer himself as a candidate for their suffrages, and intimating that it is impossible for him to make a personal

canvass, but that he would have to rely on the votes and influence of his supporters for election. Can it be supposed that in making an appeal in such a form the candidate intended that every Tom, Dick, or Harry, in the constituency who should assist in the election would become his agent.

The liability of the candidate for the acts of political associations is a different matter, and cannot be better expressed than it was by Mr. Justice Lopes, in the *Bewdley Case*, 3 O'M. & H., at p. 146: "There may be," he says, "doubtless in a borough a political association existing for the purpose of a political party, advocating the cause of a particular candidate, and largely contributing to his success, yet in no privity with the candidate or his agents, an independent agency and acting in its own behalf. To say that the candidate should be responsible for the corrupt acts of any member of that association, however active, would be unjust against common sense and opposed to law. There may, on the other hand, be an association in a borough advocating the views of the candidate, of which that candidate is not a member, to the funds of which he does not subscribe, and with which he personally is not ostensibly connected, but at the same time in intimate relationship with his agents, utilised by them for the purpose of carrying out his election, interchanging communication and information with his agents respecting the canvassing of voters and the conduct of the election, and largely contributing to the result. To say that the candidate is not responsible for any corrupt acts done by an active member of such an association, would be repealing the Corrupt Practices Act and sanctioning a most effective system of corruption." To every word of that judgment I subscribe, but it serves to make the distinction very clear between authorized and unauthorized acts, and to show that the mere knowledge that such an association was acting in his interest, would not in itself be such a recognition as to make the candidate responsible. To hold a candidate not liable in

the case first suggested, but to be responsible for the acts of a supporter because in thanking the delegates for their selection, he intimated at the same time that he would have to rely upon the exertions of his friends, would not be very consistent. The remarks could not in reason be held to be confined to the delegates or the persons there assembled, forming numerically a very small proportion of the constituency, and could confer no authority upon them that was not intended to be conferred upon all his supporters and friends.

To carry the law of agency in election cases to such a length as this would be sufficient to deter any gentleman of moderate means from embarking in a contest which might involve him in a pecuniary loss which he might be unable to afford, and would practically limit the selection of candidates to millionaires and paupers. I think far too wide a meaning has been attributed to the words of the candidate uttered on such an occasion, and that applying to them our own experience and common sense and our observation of what goes on around us on occasions such as that referred to, we ought to hold that the candidate merely intended to express the wish that his friends should give him an earnest hearty support in the contest upon which they were embarking.

OSLER, J.A.—On the questions of Harber's agency, and of the application of section 159, I do not think it necessary to add anything. I entirely concur in the view which the learned Chief Justice has taken of the result of the evidence, and of the application of that section.

The only other question is, whether, in the circumstances, the respondent is liable to be unseated for the corrupt practice committed by Harber. I was at first inclined to doubt it, but upon further consideration have arrived at a firm opinion that he is liable, and for the following reasons:

By the 34 Vic. ch. 3, (O.) sec. 3, "corrupt practices," and "corrupt practice," were declared to mean not only bribery and undue influence, but also certain illegal and prohibited

acts, with this saving, that the latter as well as the former must, by the terms of the statute, have had reference to the election.

Accordingly, in the *Brockville Case*, (1871) 3 H. E. C., 139, it was held that the sale of liquor by a saloon-keeper during polling hours on the polling day, prohibited by section 66 of the Act of 1868, 32 Vic. ch. 21 (O.) was not a corrupt practice, unless it was shewn to have been done to influence or to affect the election, or in some way to have been done in connection with it. The question there on the scrutiny was, whether the voter, a saloon-keeper, had committed a corrupt practice so as to avoid his vote under sec. 47 of the Controverted Elections Act, 1871, 34 Vic. ch. 3, and it was held by the Court of Queen's Bench, on a case referred to them by the rota Judge, that inasmuch as the liquor had been sold for the private gain only of the saloon keeper, and not in the interest of either candidate, the act even if illegal and prohibited, had not been done in reference to the election, and so was not a corrupt practice.

But as the law now stands the intent and object of the sale cannot be enquired into. Not only is the sale by the tavern-keeper during the polling day absolutely prohibited, but any violation of the section during the hours of polling is declared to be a corrupt practice at an election, as much as bribery, treating or undue influence, as those offences are defined or described in other sections of the Act. Therefore the sale or gift by the tavern-keeper—the only person who can be an offender within the section as interpreted by the Court of Appeal, in the *South Ontario Case*, H. E. C. p. 420,—whether the object be his private gain or to promote the cause of a candidate, or both, is an offence with reference to the election, and a corrupt practice, and as to the tavern-keeper himself would clearly have the effect of avoiding his vote under R. S. O. ch. 10, sec. 163, irrespective of the character of the act.

It is apparent that the Legislature in transferring this offence from the class or group of sections which relate to keeping the peace and good order at elections, to that which relates to the prevention of corrupt practices thereat, and further by specially classing it in the interpretation clause with the offences of furnishing entertainment to meetings of electors, hiring vehicles, and personation, meant to stamp it as one which in itself was in a greater or less degree calculated to affect voters, and to interfere with the freedom of the election.

The effect upon the individual who commits the offence or upon the candidate himself, if done with his actual knowledge and consent, *North Wentworth Case*, H. E. C. 343, is not doubtful: the question, is what its effect should be upon the latter if committed by his agent. R. S. O. ch. 10, sec. 158 avoids the election when a corrupt practice is found to have been committed by the candidate or by his agent, whether with or without the actual knowledge or consent of the candidate. Where then the agent is a tavern-keeper, and the agency is unrestricted and he has committed a corrupt practice by selling or giving liquor during polling hours, it would seem plain that the candidate is brought within the danger of the section.

The respondent argues that it may, notwithstanding, be shewn that the act was not within the scope of the agency, that it had no reference to the election and was done altogether *diverso intuitu*. But if the statute makes the act a corrupt practice, irrespective of the intention with which it was committed, it seems to me necessarily to follow that the respondent must be affected by it, and in so holding we do not at all extend the rule as to a candidate's liability for the acts of his agent. One of the reasons for that rule is mentioned by Mr. Justice, now Lord Blackburn, in the *Taunton Case*, 1 O'M. & H. at p. 184: "The rule of parliamentary election law, that a candidate is responsible for the corrupt act of his agent, though he himself did not intend it or authorize it, but

bonâ fide did his best to hinder it, is a rule that must at all times fall with great hardship upon particular persons. But I may just mention the considerations which no doubt led the common law, as I may call it, of Parliament to establish it. Corruption, as we all know in practice and in fact, is seldom or never done by the hand of the candidate. * * Persons were put forward to do all the work of canvassing and conducting an election, and these persons acted corruptly, but the candidate purposely kept himself out of the knowledge of anything about the matter, so that he might have the full benefit of their services, and were it not for the rule which has been established he would not suffer for their misdeeds. That is one of the great reasons."

It is a reason which applies with peculiar force to the question under consideration.

By appointing as his agent one of that class of persons by whom only the corrupt practice in question can be committed the candidate places himself in the hands of a person who may do an act well calculated to affect the election; and I entirely agree with the observation of Gwynne, J., in the *Lincoln Case*, H. E. C. at p. 399, that "it would be plainly proper that a candidate who appoints such a person as his agent should have his election avoided, if his agent should conduct himself in plain contravention of the statute, and that we should not stop to enquire whether the violation of the statute did or did not affect the election." I will only add that I think we are precluded from making such enquiry.

Our decision on this appeal renders it unnecessary to dispose of the cross-appeal presented by the petitioner (which has been argued), against that part of the judgment at the trial which holds that the petition is not sufficient in its present form, within sec. 2 of the Controverted Election Act, R. S. O. ch. 11, to embrace the offence of treating as defined or described in section 153 of the Election Act, R. S. O. ch. 10.

At present I do not wish to be considered as assenting to the construction which the trial Judges have placed upon the petition as a question of pleading, or upon R. S. O. ch. 11, sec. 2.

MORRISON, J.A., expressed his full concurrence in the judgment of Spragge, C. J. O.

A. H. F. L.

SOUTH VICTORIA.

PROVINCIAL ELECTION.

BEFORE PATTERSON, J.A., AND FERGUSON, J.

LINDSAY, 9th, 10th, and 11th July, 1883.

BEFORE THE COURT OF APPEAL.

Present.—SPRAGGE, C.J.O., HAGARTY, C.J., BURTON and OSLER, JJ.A.TORONTO, 9th November, 1883,
19th January, 1884.JOHN C. RODDEN, *Petitioner*, v. DUNCAN JOHN MCINTYRE,
Respondent.*Election Act—R. S. O. ch. 10, s. 154—Railway Passes—Corrupt Practices—
Discretion of Judge.*

The obtaining by an agent of a candidate from the president of a railway company six passes, for which nothing had been or was ever intended to be paid, three of which were used in bringing as many voters to the poll is not a corrupt practice within the meaning of the Election Act s. 154.

The mischievous effects that might arise from such a practice on the part of railways remarked upon.

Where a motion is made which depends on the discretion of the Judge, the Court will not, as a rule, review the exercise of such discretion.

THIS was a petition by John C. Rodden complaining of the undue election to the Provincial Assembly of Duncan John McIntyre, which was tried before Patterson, J. A., and Ferguson, J., at Lindsay, on the 9th, 10th, and 11th of July, 1883.

On the trial it was proved in evidence that one Hugh O'Leary, who it was admitted had been employed as agent of the respondent, had procured from Mr. Cox, president of the Midland Railway, six railway passes, five of which

were given to one Conners, who kept two of them for himself, and made use of the others in bringing three voters named Collin, Hoolihan, and Mullin, from a lumbering camp in the township of Haliburton, about twenty miles from Lindsay, where the election was held, for the purpose of voting for the respondent. The passes had been obtained from Cox by O'Leary on the representation that the respondent was being placed in a false position by his opponents in consequence of his action in connection with the amalgamation of the railways.

Nothing had been paid for the passes, nor was anything to be paid for them. Conners was requested to go to the shanties where the voters were by Hugh O'Leary and Thomas Stewart, the respondent's partner, by whom the passes were given to Conners, and also \$10 for his expenses. Conners accordingly went for the voters named, and in returning with them the train was snowed up in a drift at Fenelon Falls. Conners thereupon hired a conveyance and drove with the voters to Lindsay.

Conners swore that in doing this he had expended the \$10 given him by O'Leary and also \$11 of his own in paying for the conveyance and meals for the party, including some liquor on the way; that this had never been repaid, not had any promise of repayment been made to him by any one. The petitioner then applied for leave to amend the particulars by adding a charge of hiring teams by Conners, which was refused.

The learned Judges during the progress of the trial dismissed all the charges other than that in reference to the railway passes, reserving their decision as to this until the conclusion of the trial, when that also was dismissed.

PATTERSON, J. A., observed that it was not necessary to give any formal decision on the question, as it was clear that the giving of the passes had not affected the result of the election, the evidence clearly shewing that there was not any intention to violate the law, and that there was nothing shewn to create a suspicion that there was any

connection between the giving of these passes to bring Collin, Hoolihan, and Mullin from Haliburton and any general arrangement to supply voters with passes or other means of conveyance.

FERGUSON, J., concurred.

The petitioner thereupon appealed to the Court of Appeal, and the appeal was heard on the 9th of November, 1883.*

Hector Cameron, Q. C., and *McSweyn*, for the appellant.

S. H. Blake, Q. C., and *O'Leary*, for the respondent.

January 19, 1884. SPRAGGE, C. J. O.—Mr. H. Cameron, in addition to the arguments addressed to us by himself, refers us to the judgment of Mr. Justice Cameron in the *East Northumberland Case*. The question is substantially the same in both, viz., whether the giving of railway tickets, or of free railway passes, by an agent of a candidate to a voter, in order to his going to and returning from a polling place, such railway tickets or passes not being paid for by the agent to the railway company, or to any one, and costing the agent nothing, is in breach of that part of sec. 154 which prohibits “the payment by any candidate, or by any person on his behalf, of the travelling and other expenses of any voter in going to or returning from any election.”

Mr. Cameron conceded that if the agent conveyed the voter to and from the poll in his own private carriage it would not be within the Act. He concedes also that if the keeper of a livery stable were to place one or more of his carriages at the disposal of a candidate or his agent, for a like purpose, without cost, it would not be within the Act. I confess I am unable to perceive the difference between these cases and the cases in question.

**Present*.—SPRAGGE, C. J. O., HAGARTY, C. J., BURTON and OSLER, JJ. A.

The provisions of the section are, I think, obviously pointed at the correction of two evils: one that the hiring of vehicles and paying of travelling expenses were often made a cloak for bribery; the other that the expenses of elections were thereby greatly increased, so that men of moderate means were deterred from seeking to enter Parliament, and the choice of representatives was narrowed to those who were able, or at least willing, to expend a great deal of money to procure their election.

I cannot agree with Mr. Justice Cameron that the voter being carried without expense to himself was what sec. 154 was intended to prevent. I see nothing to indicate such to be the policy of the Act. Nor can I see any reason why it should be so. It cannot be in the public interest, it cannot be of benefit to the state that voters should be put to bear any unnecessary burthen in the exercise of their franchise as voters. On the contrary it is the policy of the law to afford reasonable facilities to voters. Hence the change of the law from one, to several polling places in an electoral division; and other legislative provisions in the same direction. And the same policy is indicated in the Representation of the People Act, 30 & 31 Vict. ch. 102 Imp; sec. 36 of that Act relates only to boroughs in England and Wales, and it prohibits as a general provision the payment of any money on account of the conveyance of any voter to the poll, but it excepts East Redford, and four other boroughs from this general prohibition; and the reason for this exception, as given by Baron Martin in the *Salford Case* (1 O'M. & H. 135) was, that in those boroughs the voters lived at a distance from the polling places. His inference was that it was the intention of the legislature that the voters in other boroughs should either walk or go in their own carriages. I do not know that the inference was a just one. It certainly was not a necessary one; when all that was prohibited was the payment of money on account of the conveyance of any voter to the poll. "It is permitted" (the learned Baron says for the reason that he had given, that in the excepted boroughs) "hired con-

veyances should be provided." The making of that exception indicates very clearly the policy of the Legislature to be, not that the voter should have to bear any unnecessary burthen, but that he should have every facility for the giving of his vote.

Upon the language of Baron Martin, assuming that his inference was a correct one when applied to an English borough, I may observe that it by no means follows that it would be correct, if applied to a Canadian rural constituency. The conditions are essentially different, as to geographical extent, and as to the habits of the people.

Mr. Justice Cameron says, and I agree with him, that in construing an Act of Parliament the mischief intended to be prevented, or the remedy provided, to be gathered from the enactment must be regarded; and effect so given to the statute as to carry out the intention of the Legislature; without, of course, by judicial decision extending the operation of the Act beyond what the language itself will reasonably cover. But with great deference to the learned judge I cannot but think that he has erred in his application to this case of both points of the canon of construction that he has propounded. I do not find anything in this enactment indicating that the Legislature regarded the conveyance of voters to and from the poll, free of expense to the voter, and free of expense also to the candidate, and to any one acting on his behalf, as a mischief to be prevented. And as I read this enactment it would be straining the language used beyond its ordinary legitimate meaning to interpret the word "payment" in the connection in which it is used, to something which is not payment, by or for the candidate, but simply a saving of the expense of travelling to the voter, without cost to the candidate. If the legislature had meant to prohibit this I assume that they would have known what apt words to use to express their intention.

I agree in the judgment upon this point of the learned Chancellor.

Mr. Cameron upon this appeal makes a contention in relation to these railway tickets and passes, which is not noticed in the opinions certified to us by the rota judges. It is that the giving of these papers was a breach of trust : that they could not have been obtained and used for the purpose for which they were used without there being a breach of trust. We do not know this as a matter of fact, and we cannot assume that any wrong was committed, and if a wrong it was a wrong between third parties. The argument I understand to be that the shareholders have a right to exact payment from some one for these tickets and passes, and if that right were enforced there would be a payment. It amounts to this that a possible liability to account, and that not shewn, but which we are asked to presume, is a payment within the meaning of the statute. I think this position wholly untenable.

My opinion is, that the appeal should be dismissed, with costs.

With regard to the application made to the rota judges for leave to amend the particulars if an amendment should be necessary, I think in the first place that the charge in the particulars did not cover that of which in addition to the question of railway fares the petitioner desired to give evidence. It was a cognate charge, but not the same charge, and therefore without an amendment evidence of it could not be given. The application for leave to amend was an application to the discretion of the rota Judges ; they in the exercise of their discretion refused, and we are asked to review that exercise of discretion.

In the case of *Kennedy v. Braithwaite* (a), which was an appeal from the exercise of discretion by my brother Burton upon an application before him, I gave shortly my view as to how appeals from the discretion of a judge exercised upon an application for an indulgence should be dealt with. I refer to what I said then, because it was as I understood assented to by the other members of the Court.

My brother Patterson, one of the rota judges who tried this case has been good enough to explain why the application to amend was refused.

Appeal should be dismissed.

HAGARTY, C. J.—I fully agree with the general views of my brother Cameron as to the giving of free passes to voters on a railway. He holds such a proceeding to be within the Act of the Legislature.

It may well be said to be within the general mischief aimed at in the Act, but I do not think that sufficient in itself; it must also be, in effect, the thing prohibited by the Act: see *Philpotts v. St. George's Hospital*, 6 H. L. C. 338.

It is likely that the Legislature may amend the Act so as clearly to cover such a case.

To my mind the giving of free passes could be made a powerful engine of corruption and undue influence.

I do not concur in the supposed analogy between a voter travelling on a free pass over the railway and the case of a voter travelling in a neighbour's wagon, or in the carriage of the candidate, or one of his agents or friends. On such a principle, if the president or a director of a railway company were a candidate, all those expected to support him might be carried free, or the company might offer to carry all voters free from a particular locality known to be favorable to their officer.

I entertain a very strong view as to the mischievous effects that might arise from such a practice on the part of the great railway companies—the monopolists of most of the carriage business of the country. But I feel compelled to hold that the statute does not, in terms, prohibit this practice.

My remarks are on the general principle. I agree that nothing was done in the case before us materially to influence the result of the election, and concur in dismissing the appeal.

I see the recent Imperial Act as to elections, 46 & 47 Vict. ch. 51, sec. 14, forbids the letting, lending, or employing for conveyance of voters any public stage, hackney carriage, or horses used for drawing same, or carriages or horses kept for letting out for hire.

BURTON, J. A.—The principal question of law argued on this appeal is the same as that argued in the *East Northumberland Case*, namely, whether the furnishing of railway tickets or passes to voters is a corrupt practice within sec. 154 of the Election Act.

I think there was no difference of opinion between the learned counsel as to the rules to be applied in the construction of the statute, that is to say, that no different rule was to be observed by reason of its being a penal statute. That rule is well expressed by Mr. Sedgwick, in his excellent work on Statutory and Constitutional Law, where he remarks :

“These decisions naturally modify the old rule, that penal statutes are to be construed strictly. The more correct version of the doctrine appears to be that statutes of this class are to be fairly construed and faithfully applied according to the intent of the Legislature; and again, these decisions shew the gradual tendency of the judicial mind to disavow and renounce any right to construe statutes according to considerations of policy or hardship, and to recognize the duty of conforming on all occasions to the will of the law-making body.”

And Lord Bramwell, in one case, after referring to the rule that every Act of Parliament is to be read according to the natural construction of its words, adds, “The rule properly understood is, that the burden of proof is on the assertor, not that wherever there is any doubt a statute is to be said not to mean what it does mean.”

What is there then in the words of this enactment to warrant the contention of the petitioner that a free gift of a railway ticket comes within them?

The section in question commences with a recital that doubts may arise as to whether the hiring of teams and vehicles to convey electors to and from the polls, and the paying of railway fares and other expenses of voters be or be not according to law, and therefore enacts that the hiring or paying for any horse, team, carriage, cab, or other vehicle by any candidate, or by any person on his behalf to convey voters to, or near, or from the poll, or the payment by any candidate, or by any person on his behalf of the travelling and other expenses of any voter in going to or returning from any election shall be illegal acts, and the person so offending shall thereby incur a penalty of \$100.

Acting upon the principle that the affirmative of the proposition must be made out by the petitioner, I can only say that so far from such affirmative having been established it is impossible I think to place such an interpretation on the language the Legislature has employed: to bring the case within the section it must be both within the reasonable and natural meaning of the terms used, and within the spirit and scope of the enactment.

In my opinion it is not within either, and the learned Judges came, I think, to the right conclusion in the disposition they made of these charges.

The only other point is whether the hiring of the teams by Connors to convey the electors to whom the railway passes were given from Fenelon Falls, owing to the railway being blocked by the snow, was embraced in the particulars, or if not, whether the learned Judges were wrong in refusing an amendment.

It can scarcely be gravely contended that it falls within the particulars when the corrupt practice charged is in one case "\$25 and lost time," in another "fare and lost time," and in a third "\$8 and lost time."

And in a case where every corrupt charge had been dismissed it could scarcely be claimed that the amendment was "necessary for the advancement of justice," the only effect of the amendment, if borne out by the evidence, being to saddle the respondent with the costs of the trial

for the act of an agent, done without his knowledge or consent, and an act innocent in itself, except in so far as it might be found to be within the prohibition of the statute.

I think that the appeal fails on all grounds, and should be dismissed, with costs.

OSLER, J. A.—Upon the principal question involved, namely, whether giving railway passes to certain voters to enable them to attend the polls is an infraction of sec. 154 of the Election Act, I have given the most anxious attention to the arguments addressed to us by Mr. Cameron in support of the appeals in this case and the *East Northumberland Case*, and to the judgment of my brother Cameron delivered on the trial of the latter case before himself and the Chancellor.

The question turns upon the meaning to be attributed to the expressions “payment of railway fares,” and “payment of the travelling expenses,” used in the above section, and it is contended that when a railway company, at the instance of a candidate or his agent, furnish free passes over their railway to enable voters who are supporters of such candidate to attend at the polls, nothing being, in fact, paid to or intended to be charged by the railway company for such passes, the railway fares or travelling expenses of such voters are nevertheless paid by the candidate, or his agent, within the meaning of the Act.

In its recital and enacting part the 154th section deals with two things: 1st. The hiring of teams or vehicles to convey voters to the polls; and 2nd. The payment of the travelling and other expenses of a voter in going to or returning from the election. The recital speaks of the “paying of railway fares” and other expenses; but the language of the enacting part is more general, prohibiting payment of “travelling” and other expenses.

It is easy to see that the practice of which we have illustrations in these two cases may lead to grave abuses where the president or other official of a railway company, or other great carrying corporation, happens to

be a candidate, or where such a corporation, for ulterior purposes, desires to support some particular candidate or political party; and if such practice is not within the enactment in question, it may well be made the subject of express legislation. What we have here to consider however is whether it is within, not merely the spirit of the enactment, or the mischief intended to be remedied by it, but also within the reasonable meaning of its terms. We are to adopt the ordinary canons for the construction of statutes, which, as understood and applied in modern cases, even to penal or prohibitory Acts, appear to me to be not different from those laid down by the Interpretation Act (R. S. O. ch. 1, sec. 8, subsec. 38).

I will briefly refer to two or three of these cases, trite as the passages quoted may seem.

In *Warburton v. Loveland*, 1 Huds. & Br. 648, cited in the celebrated case of *Miller v. Salomons*, 7 Ex., at p. 527, this rule was enunciated "It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience but no further."

In *Stephenson v. Higginson*, 3 H. L. C. 686, Lord Truro said: "In construing an Act of Parliament every * * word must be understood according to the legal meaning, unless it shall appear from the context that the Legislature has used it in a popular or more enlarged sense; that is the general rule, but in a penal enactment where you depart from the ordinary meaning of the words used, the intention of the legislature that those words should be understood on a more enlarged or popular sense must plainly appear."

In *Alexander v. Brame*, 7 D. M. & G. 525, 539, it was said by Lord Justice Turner: "There is perhaps no question in the law more difficult to be determined than the question what particular acts, not expressly prohibited,

shall be deemed to be void as being against the policy of a statute. It is no doubt the duty of the Courts so to construe statutes as to suppress the mischief against which they are directed, and to advance the remedy which they were intended to provide; but it is one thing to construe the words of a statute, and another to extend its operation beyond what the words of it express."

In *Philpott v. St. George's Hospital*, 6 H. L. C. 338, cited in the judgment, the Master of the Rolls had held a bequest to be void on the ground that it came within the spirit of the statute of mortmain having as he said a direct tendency to bring lands into mortmain. Lord Cranworth says, in the passage referred to, that when you find that anything done is substantially that which is prohibited, it is open to the Court to say that it is void, not because it comes within the spirit of the statute, but because by reason of the true construction it is the thing or one of the things the statute meant to prohibit.

Then he holds that upon the true construction of the statute the bequest is not void merely because its tendency was or might be to bring lands into mortmain.

I go along with my brother Cameron in adopting the language of Lord Cranworth as containing the principles applicable to the construction of the 154th section; we only differ in our view of the substantial identity of the thing done with the thing prohibited. In testing this, the observations of Lord Brougham in the same case are very much to the point, "We cannot feel any doubt as to the meaning of the words used; we may look at the spirit as well as the letter of the enactment. But we are called upon to go a great deal further and to look at the presumed intention of the Legislature. Because the Legislature has confined itself to one specific mode of accomplishing its purpose, we are therefore to add enactments which the Legislature never made, provisions beyond what the Legislature has made for the purpose of completing that which it left defective. I am not at all prepared to adopt any such general principle of construction."

See also *Attorney-General v. Jefferies*, 13 Price 580, and *Dyke v. Elliott* "*The Gauntlet*," L. R. 4 P. C. 184, 191, per James, L. J.

To apply these authorities to the present case. We find that the Act forbids under the same penalty the hiring of teams, and the payment of travelling expenses whether railway fare or stage fare. Admittedly it is lawful to use, in carrying voters to the polls, as many vehicles as the owners choose to freely lend or volunteer for the purpose. Nothing but the actual hiring is forbidden. If that be so I do not see how it can be said that the gift by a railway company of free passes over their railway can be said to be plainly within the spirit or scope of a prohibition against payment of travelling expenses or the paying of railway fares. If the voter travels free as regards himself and the candidate he merely has no travelling expenses. What the section strikes at, is, not the saving of expense to the voter, but the expenditure of money by the candidate. Is it then the same thing as regards the latter, whether by influence which is legitimate because not forbidden, he procures free passes for voters, and so enables them to attend without expense, or whether he pays such voters or the railway company their travelling expenses? The two things seem to me essentially different, the former, apart from its greater liability to abuse, being in principle the same as obtaining the free use of vehicles to take voters to the polls.

Therefore I conclude that the practice in question is not one of the things the Act meant to prohibit; the words, as Lord Wensleydale says in the *St. George's Hospital Case* "have a clear and distinct meaning, and no doubt they were used in the statute in the sense in which they would be used anywhere else."

I will only add in reference to the *Salford Case*, 1 O'M. & H. 133, 20 L. T. N. S. 120, that the observations of Mr. Baron Martin, quoted by Mr. Justice Cameron, were made in dealing with the question of conveyances hired for the voters, or hired by the candidate and used by the voter.

So in the *Stroud Case*, 2 O'M. & H. 185, and the *Bolton Case*, 2 O'M. & H. 144, where free passes had been given to the voters, it will be seen that the railway company had been paid for them.

There remains the question of the amendment of the particulars as to the charge of hiring teams to convey voters who had come as far as Fenelon Falls on the railway.

Mr. Cameron contended that this charge was substantially covered by the particulars, which allege payment of the railway fare of these voters, whereas, for part of the distance they travelled by means of some other hired conveyance. Technically and literally, however, it is a different charge, and I do not think we should be warranted in interfering with the discretion of the learned trial judges merely for the purpose of throwing the costs upon the respondent, especially in a case where, upon the whole the election has been fairly and properly conducted.

I must say, however, that the language of the particulars ought not to be too nicely construed, and that amendments within the scope of the petition ought to be freely made on such terms, if necessary, as will prevent the opposite party from being taken by surprise, or incurring unnecessary costs.

I think the appeal should be dismissed.

(a) KENNEDY V. BRAITHWAITE.

Appeal from order of Burton, J. A., refusing the plaintiff's motion to extend the time for delivering the appeal books.

McPhillips, for the plaintiff.

Aylesworth and *Holman*, for the defendants.

SPRAGGE, C. J. O.—The plaintiff desiring to appeal from the judgment which was against him in the Court below, was not prepared to deliver his appeal book within the time prescribed by the General Orders of the

Court; and applied to my brother Burton to grant him further time for the purpose. This application, after hearing both sides, and the affidavits filed for and against the applicant, was refused. The plaintiff has appealed from this decision of my learned brother to the full Court.

The application was for an indulgence, and therefore to the discretion of the learned Judge to whom it was made; who would, in exercising his discretion, give due weight to all the circumstances brought before him, not only in respect of the diligence or negligence of the party making the application; but also in respect of the nature of the case, and whether having regard to all that was before him, the granting of the application would be or would not be in furtherance of justice.

Upon this application to this Court, which, in either of the two shapes in which it is made, is in reality an application from the judgment of my learned brother, we are asked to over-rule the discretion which he has exercised.

He has gone over with us the circumstances of the case as presented to him, and sees no reason to change the opinion that he formed of it, when it was before him. I do not myself express any opinion upon it. I have not, and could not, well have gone over it without forming some opinion; but I abstain from expressing it for one reason, and one reason only—viz., that the question being [one simply for the exercise of the discretion of the learned Judge who heard it, we, of the Appellate Court, upon seeing it to be so, should, as a general rule, not interpose our own discretion one way or the other.

I do not mean to say that it is a hard and fast rule that the exercise of the discretion of a Judge may not be reviewed; but rather that the Court imposes upon itself as a general rule from which it rarely departs, that it does not interfere where the matter appealed is simply from the discretion of a Judge exercised in a matter proper for the exercise of his discretion.

This seems to be the course in England, and, is, I think, obviously the proper course.

MUSKOKA AND PARRY SOUND.

PROVINCIAL ELECTION.

BEFORE MR. JUSTICE PATTERSON AND MR. JUSTICE
FERGUSON.

BRACEBRIDGE, *August 21st-25th, 1883.*

BEFORE THE COURT OF APPEAL.

Present.—CHIEF JUSTICE HAGARTY, MR. JUSTICE BURTON, MR. JUSTICE
MORRISON, MR. JUSTICE GALT.

TORONTO, *June 2nd, 30th, 1884.*

GEORGE PAGET AND PETER LEO MACKENZIE, *Petitioners,*
v. FREDERICK GEORGE FAUQUIER, *Respondent.*

Corrupt practice—Bribery—Agency—Appeal by candidate for help from those present at nomination—Difference between commercial agency and election agency—Voting in unorganized district—Hiring vehicles—Furnishing refreshments at meeting of electors—Disfranchisement of candidate—Relief from such disfranchisement—R. S. O., ch. 10, secs. 149 (a) 151, 154, 161, 162.

Where N. who appeared to have been agent of a candidate, called upon M., an elector, and, without directly asking him to vote, handed him one of the candidate's cards, and stated that he was going to give M.'s wife a present, but that he could not give M. a present, because it was election time, and that M. could get a present for his wife any day he was in B. (one of the places where voting was to take place); and M. went to B. the night of the election and got the present, which was tea and sugar, &c., worth about \$2.

Held, (at the trial) per PATTERSON, J. A., and FERGUSON, J., that this came within the acts spoken of in R. S. O. ch. 10, sec. 149, (a) and that the goods having been given to M. under the idea that he had voted, it was immaterial whether it was proved that M. had actually voted or not.

It appeared that when the candidate accepted the nomination of the convention of the party he intimated to those present, amongst whom was N. that he looked for their active exertions in carrying on the contest.

Held, per PATTERSON, J. A., and FERGUSON, J., that this amounted to an authorization of those present including N. to canvass and thus to act as agent, for the authorization to canvass covers agency and even with-

out any such express declaration the agency of those persons who were actually attending and taking part in the convention was established in the absence of anything shewing a repudiation or rejection of the offer of services, which is implied by the very fact of their attending and making the nomination.

Agency in election cases differs from agency in ordinary commercial or other transactions of business, inasmuch as in the case of an election the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of any authority expressly given to him, but which may be directly contrary to the express directions of the person whose agent he is held to be.

Held, also, by PATTERSON, J. A., and FERGUSON, J., that, (1) a person, the owner of real estate of the value of \$200 or upwards, anywhere within the electoral district, has the right to vote at any polling place in the unorganized townships in the electoral district where he may happen to be on polling day; (2) That where the real estate on which such person relies as his qualification to vote is situate in one of the unorganized townships his right is to vote in any of the unorganized townships without being restricted to the township where his property may be situate; (3) That to entitle a person to vote in the unorganized townships on the qualification of house-holder, he must be a house-holder—that is to say, have his qualification as such—within the limits of the unorganized township.

Held, also, by PATTERSON, J. A., and FERGUSON, J., that what is referred to in R. S. O. ch. 10, sec. 154, is hiring vehicles to convey persons with the intention of their voting, and the qualification of such persons, or their right to vote, is immaterial, whereas section 153 requires persons therein referred to be voters.

One A. had hired teams and taken voters to the polls contrary to R. S. O. ch. 10, sec. 154, and it was proved that the candidate being in the village of G., was told that A. was there for the above purposes, and that he went to see A. in his hotel and discussed the election and the probable results, with lists of voters, &c.

Held, per FERGUSON, J., that this was sufficient to prove the agency of A. in the matter.

Held, per PATTERSON, J. A., that this, and other circumstances of the case, established such agency.

It appeared that on February 15th, the respondent was chosen by a convention of his party as their candidate. On February 23rd, a public meeting was held by him in a room in a hotel, which meeting was composed of about sixteen persons, some belonging to the opposite political party. A chairman was appointed and the respondent addressed the meeting, as did others also. As soon as the proceedings closed, *i. e.*, when the speaking was over, nearly all present crossed the hall, and went into the bar-room. The respondent followed, first inviting the few who remained to join them, and then in the bar-room invited them to drink, which they did, he paying for the liquor. On February 27th the nomination took place, and the polling on March 13th.

Held, (at the trial and by the Court of Appeal, GALT, J., dissenting,) that this was a violation of R. S. O. ch. 10, sec. 151.

Per HAGARTY, C. J. O., and BURTON, J. A., R. S. O. ch. 10, sec. 151, refers clearly to a meeting of electors, whether the formalities of appointing a chairman or secretary are observed or not.

Held, also, (GALT, J., dissenting).—That though the act of treating appeared to have been committed in ignorance that it was a violation of the statute, it did not appear to have been committed in an ignorance which was in voluntary or excusable.

It appearing that a number of persons visited the district, and that the object of their visit was to influence the electors by corrupt means, and that there was an organized and systematized plan to employ corrupt

means to influence and carry the election in various ways, and that the trial judges were not satisfied that the respondent was ignorant that such practices were likely to be committed by persons acting in his behalf in the conduct of the election, and found that corrupt practices prevailed at the election, and declined to relieve the respondent under sec. 162, of the penalties incurred by him under sec. 161, the Court of Appeal now declined to interfere with their decision. (GALT, J., dissenting.)

Per HAGARTY, C.J.O., when a corrupt practice is proved the onus is at once shifted to the respondent to bring himself within the saving clause, R. S. O. ch. 10, sec. 162.

The Prescott Election, ante p. 88, followed.

Per BURTON, J.A., under the present enactment in R. S. O. ch. 10, sec. 151, it need not be shewn that the meeting in question was assembled for promoting the election of the candidate furnishing the entertainment, but the meeting referred to is a meeting assembled for the purpose of promoting the election of a representative of the electoral district.

Per GALT, J., Refreshment was not furnished to the meeting while it was assembled, and therefore there was no offence under R. S. O. ch. 10, sec. 151. The meeting was to all intents and purposes at an end, and moreover, even conceding the corrupt act, it was done in ignorance, which was voluntary and excusable.

THE petition herein was by George Paget and Peter Leo McKenzie, persons who voted or had the right to vote at the election of a member to represent the Electoral District of Muskoka and Parry Sound in the Legislative Assembly holden on March 13th, 1883.

It was filed on May 7th, 1883, and set out that the nomination for the said election took place on February 27th, 1883, and the election on March 13th, 1883, when Frederick George Fauquier and James Whitney Bettes were the candidates, and the former was returned as duly elected: that prior to, during, at and after the said election, the said Fauquier, by himself and his agents, and other persons on his behalf, was and were guilty of corrupt practices as defined by the Elections Act, and the Controverted Election Act, of Ontario, and of other illegal acts and practices at the said election, which affected the result of the election, and the said election was in fact and in law void.

It then made sundry other charges as to the reception and rejection of votes at the said election, and prayed that it might be determined that the said Fauquier was not

duly elected or returned, and that his election was void, and that the said Bettes was duly elected.

The trial commenced at Bracebridge, on August 21st, 1883, before Patterson, J. A., and Ferguson, J., and lasted till August 25th.

Particulars were delivered before the trial of the corrupt practices charged in the petition, number 98 of which stated that William Mason, of the township of Monck, farmer, had been corrupted by Robert Nichol, of Bracebridge, farmer, at Bracebridge, between February 27th and March 13th, 1883, in respect of the said Nichol giving or agreeing to give, or promising, money or valuable consideration contrary to section 149 sub-section (a) of the Election Act.

The evidence shewed that Nichol came to Mason's house on the day of the election, and asked Mason if he was going out to the election, and whom he was going to vote for: that Mason said (according to his own statement, in joke) he would vote for the man who had the most money: that Nichol then handed to him one of Mr. Fauquier's cards, saying he was the man that he (Nichol) was going to vote for, but did not directly ask Mason to vote for Fauquier: that Nichol also stated to Mason that he was going to make Mason's wife a present, a personal present from himself, but that he could not give him, Mason, anything because it was election time, and that Mason could get the present any day he was in Bracebridge: that Mason went into Bracebridge the night of the election, and there saw Nichol, who told him to go to a certain shop-keeper, where he would get the present for his wife: that he went and received the present, which was some tea and sugar, and "the like of that," worth about \$2, and Mason took the things home.

Nichol himself was not examined, the petitioners not having been able to subpoena him.

As to the nature of the evidence adduced to shew the agency of Nichol, it sufficiently appears from the judgment of Patterson, J. A.

Bethune, Q. C., *Lount* Q. C., and *Johnston* for the petitioner. Nichol was duly appointed a delegate, and attended the convention. The respondent said that he expected his friends to canvass. The question is, did Fauquier desire to have the assistance of Nichol and the other people? The respondent has not called Nichol, but he would have done so, if Nichol would have denied the agency. We refer to: *The Cornwall Case*, H. E. C. p. 547; *The South Norfolk Case*, *ib.*, at p. 665; *East Northumberland Case*, *ib.*, p. 387; *The Taunton Case*, 2 O'M. & H. 66; *The Salisbury Case*, 44 L. T. 192; *The Bewdley Case*, 3 O'M. & H. 145; *The Chester City Case*, 44 L. T. 285, and as to silence with knowledge being equivalent to adoption: *The Borough of Taunton Case*, 1 O'M. & H. 181; *The Borough of Wakefield Case*, 2 O'M. & H. 100; *The North Ontario Case*, H. E. C., p. 785.

H. Cameron, Q.C., *Arnoldi*, and *Mahaffy*, for the respondent, referred to *The North Ontario Case*, H. E. C., p. 304; *The Welland Canal Case* (2) *ib.* 187, 195; *The North Grey Case*, *ib.*, p. 362; *The East Northumberland Case*, *ib.*, p. 387.

August 23rd, 1883. PATTERSON, J. A.—This charge which is No. 98 in the particulars of corrupt practices, is a charge of the bribery of Wm. Mason by Robert Nichol, alleged to be an agent of the respondent, by giving or agreeing to give, or promising, money or other valuable consideration, contrary to sub-section (a) of section 149 of the Election Act, R. S. O. ch. 10. That section declares:

“The following persons shall be deemed guilty of bribery, and shall be punishable accordingly: (a) Every person who, directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers or promises any money or valuable consideration, or promises or endeavours to procure any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any person in order to induce any voter to vote or refrain from voting;” then there is the further provision in the sub-section, “or cor-

ruptly does any such act as aforesaid on account of such voter having voted or refrained from voting at any such election." The act which is the subject of the charge here, as proved to have been done by Robert Nichol, comes under one or other of these alternatives in the sub-section. I have no doubt upon the evidence that the offer was made, and whether it was to Mason himself directly, or indirectly to him or under the form of making a present to his wife, or whether it was an offer to the wife herself on account of Mason voting or refraining from voting, or was promised in one form or other, is immaterial. It was substantially made by Nichol to Mason. Then the performance of the promise, which was after the polling, requires to have been corruptly done, according to the words of the sub-section, "on account of such voter having voted or refrained from voting at any such election."

Some remark has been made that it has not been distinctly proved that Mason voted or refrained from voting. I have no doubt upon the evidence that the goods given to Mason were given to him under the idea that he had voted; whether he had done so I think was not very distinctly proved. I think it is immaterial whether that is proved or not, if the evidence reaches so far as to show that the giving of the present came within the words of the sub-section quoted. If given on account of the voter having voted or refrained from voting no doubt it is a corrupt practice. The promise itself is sufficient proof of the violation of the sub-section, even if that promise were not carried out. The important question upon the evidence is the agency of Nichol. With respect to that my learned brother and myself, after hearing the arguments on both sides and discussing the matter together now, with the advantage of having given a great deal of attention to the question in other cases, are of the opinion it is quite impossible to take the case out of the principle on which we decided but recently in the *West Simcoe Case*, ante p. 128 as to the charge against Harber.

There is in the interpretation of the word "agency" in election cases a difference from the accepted definition in

the ordinary transactions of life, a difference which has been frequently pointed out in the English cases as well as in those decided in our own Province; a distinction between the character of the agency which is to be held to exist for the purpose of an election, and an agency as it exists in ordinary commercial or other transactions of business, where one man acting for another receives authority, and can only bind his principal by acts done within the scope of the authority which is given to him. There is a difference between agency of that character and agency for the purposes of an election. In the case of an election the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of any authority expressly given to him, but which may be directly contrary to the express directions of the person whose agent he is held to be. But besides the distinction which is given in the English cases and our own, there is this to be kept in view when discussing what is sufficient to establish the position of agent in regard to any person charged with a violation of the Act—the mode in which these election contests are almost universally, if not quite so, carried on in this country. Where as in this case a number of persons assemble together, whether you call it by the name of convention, association, or any other, when they do assemble for the purpose of selecting a candidate to contest the constituency as the representative of a particular party, and when the person chosen accepts that nomination, he does so because he has been selected by those persons; and whether they put themselves forward or are put forward for the purpose as representative persons, he puts himself into their hands necessarily in accepting the nomination which they make, not putting himself forward and asking their support, but coming forward because they ask him to consent to run, or as it may be more appropriately put, to consent to be run by them.

The construction which may apply here and lead to the decision that one person or another is agent of the can-

didate, in England might in a few cases only be held to apply. Of late years there seems to be more tendency in England, as far as one can judge, to approach to some extent to the position to which we have advanced, and accordingly we find in one or two of the decisions following the election of 1880, references to the circumstances of the candidate being put forward by an association as their candidate, and the agent, on that account, requiring but slight recognition on his part. There is evidence here, as there was in the case I have referred to in West Simcoe, of the action of the candidate. When he accepted the nomination of the convention he addressed some remarks to those who were there, intimating in some form of words that he looked for their active exertions in carrying on the contest. The evidence of Mr. Holden is direct with respect to that. The candidate himself does not recollect, and did not suppose at the time of giving his evidence that he used words of the character spoken of by Holden, but he thinks, to give his own language substantially, he did expect his friends to work, and, although he talked of making a personal canvass, that amounted simply in my opinion to an expression of his intention to make every exertion. That resolve he appears to have very energetically carried out, holding altogether thirty-two meetings between the time of the nomination by the convention and the election, and from anything he said, whilst he expressed his intention actively and energetically to personally exert himself, I cannot see that it can be inferred that he at all intimated to those who were there that he did not expect them to also work, that he did not rely upon them doing what they could for him, much less that he ever gave the slightest intimation to them that they were not to work, or that he repudiated anything they might assume to do. While there is evidence, therefore, and evidence that strikes us as reliable, that remarks of the character Mr. Holden speaks of were addressed to those present, I am not at all disposed to say that any express declaration of the kind would under the circumstances be necessary to constitute

the relation of agency in those gentlemen who were there actively engaged in the convention and taking part in the nomination of the candidate.

To hold the contrary, one would have to assume that in answer to the nomination which had been unanimously given the candidate, he gives or conveys to them in some way an intimation that the work is entirely to be done by him, that when they asked him to be their candidate, the representative of their and his party, that was not to be treated on their part as an offer to exert themselves to elect him as the representative of the riding, or an acceptance on his part of such offer. In order to enable us to hold that anything took place on such an occasion amounting to repudiation by the person who is selected to be the candidate at the election, or who is requested to allow himself to be put in nomination as the candidate of the party, something express in the nature of repudiation must be shown. Nothing of the kind was shown to be intended here. To test the question in this way: Mr. Nichol went there in some way or other; he was there at all events as one of those actively concerned in the nomination. Suppose on leaving the meeting he meets some parties outside, and talks to one of them, saying, "Mr. Fauquier has agreed to be the candidate—will you vote for him?" Could it be said Mr. Nichol was not authorized to canvass the man on the occasion? I think it would require exceedingly strong evidence to show he was not. If he was authorized to canvass, by that I mean asking a man for his vote, then his agency is covered. That constitutes the agency. The question is, whether the person in question is authorized to canvass for the candidate. Without any reference, therefore, to acts done by the agent in pursuance of his agency, I am prepared to hold that the agency of these persons who are actually attending and taking part at this convention is established in the absence of anything showing a repudiation or rejection of the offer of service which is implied by the very fact of their attending and making the nomination. I adhere to the ruling indicated in the

judgment in the case delivered a few days ago at West Simcoe. I may repeat the remarks I then made that it was not at all necessary for the purposes of that decision, to say how far any intimation of the desire of the candidate, or his friends who supported him, would extend to create the relation of agent with respect to other friends of the party or the candidate who were not present or taking part in the proceedings of the convention. Whether it would or would not is a matter to be decided in each particular case, and has to be governed to a great extent by the circumstances of the particular case. We are simply dealing with the case before us in which the person attended the convention. While it is not necessary to look to the acts done by the alleged agent, acts done by the person charged as agent may, as I have endeavoured to point out in the judgment to which I have been referring, become very important on the question of agency where recognition by the candidate of the person or the acts done is what has to be proved. Where the appointment of the agent is proved by direct evidence the acts done themselves become of little importance, because the first act done would be just as much the act of the party as agent as any subsequent act. In this cause there is evidence of a considerable amount of activity on the part of Nichol, which is evidence, at all events, of his understanding, whether it was the understanding of all the friends or not, that at all events he was at liberty to do what he could on behalf of the candidate. We hold therefore in this case a corrupt act by an agent of the candidate has been established. It appears that the character and extent of the act is confined according to the account which we have of it, to the immediate transaction between Nichol and the individual, and at present there is certainly no evidence before us of any knowledge or consent on the part of the candidate to the corrupt act by the agent.

FERGUSON, J.—While I entirely agree with the remarks which have fallen from my learned brother, I am disposed

to lay more stress on what passed immediately after the meeting at Rosseau as constituting agency. Mr. Fauquier was informed that the convention had nominated him, and he made a speech. It is not said whether he thanked the convention or the members of it at the time, but something of the kind passed, and he then said, (according to Mr. Holden,) that he hoped his friends would work and do all they could to secure his return, or something to that effect. Those who had made themselves active and were members of that convention, whether they were formally acknowledged or not, were certainly included in the general expression "friends," and I cannot conceive that the statement made there was less than intimating to those present at the convention, "I expect you to do all you can to secure my return." Mr. Fauquier himself says the fact is he did expect the friends to work for him, and he used the words "work it up." He said: "I thought my friends would canvass, would mention my name whenever they met people, and work it up." I am disposed to lay more stress on that particular point, what was said by Mr. Fauquier immediately after the nomination, than my learned colleague has laid upon it. I am disposed to look upon that in effect and in fact as authority by the respondent to those people to act as agents for him. Suppose that on the way home they had been mentioning his name to voters and canvassing, could it be said they have not authority so to do? I think not. It has been held, over and over again, that the test of agency is whether there was authority to solicit votes. It seems to me these parties had authority from the candidate to do that. Then, if there was authority to do that, and while doing it a corrupt act had been committed by one of them, the candidate would be liable for that corrupt act. I simply desire to say that I lay more stress on that part of the evidence than my colleague, and I agree in all that has fallen from him.

After giving judgment as above, the Court next proceeded to deal with certain charges made against James

Anderson and G. F. Marter, charging them with taking certain persons out to a polling place in the Township of Gibson, an unorganized district, for the purpose of voting, furnishing them with meat and drink, and paying their expenses.

These charges thus raised the question of the right of voting in the unorganized districts, as well as of the agency of Anderson and Marter, and the quality of their conduct as viewed in the light of the Election Act.

One of the persons thus conveyed to the polling place in the unorganized district was named Johnstone, and he was the only one who was allowed to give his vote. This he was permitted to do on the ground that he owned property in Baxter, another unorganized township.

The effect of the evidence given sufficiently appears from the judgments.

J. Bethune, Q. C., and Johnston. As to the right to vote in unorganized territory, "Such place," in R. S. O. ch. 10, sec. 92 (2), is to be read as "such municipality, township, or place in Muskoka and Parry Sound as have no assessment rolls, "place" being the largest word includes the others. The "house" must be in the unorganized place. Then as to the one who voted as "owner," the real estate must be in some of the places in which there is no assessment roll. As to corrupt practices, sections 153 and 154 have been violated. The evidence shews clearly that Anderson and the others were agents. Fauquier did not keep aloof from Anderson. The offence was complete so soon as the contract of hiring the teams was made; *Young v. Smith*, 4 S. C. R. 494. As to Johnstone having received meat and drink on account of his being about to vote or having voted, we refer also to *East Northumberland Case*, H. E. C., 577; *The Stormont Case*, *Ib.*, p. 21; *The Lichfield Case*, 1 O'M. & H. 22; *The Guildford Case*, 1 O'M. & H. 15.

H. Cameron, Q. C., and Arnoldi. As to the right to vote, the qualification in the unorganized parts is on a different basis from that in the organized parts. A man owning property in one organized township has not the right to vote in any other unorganized township if there is a polling place in the first-mentioned township. As to the other points, we admit that the offence is complete when the teams are hired. Unless, however, the persons carried had votes, the section of the Act has not been shewn to have been violated, and the onus is on the petitioner to shew that these persons were good voters. Johnstone's case is unlike the others. Anderson, however, was not the agent of Fauquier. He had no connection with him, beyond the fact that very shortly before the election Fauquier knew Anderson was working on his behalf, nor is it shewn that Fauquier knew of or authorized any particular act of Anderson's. Probably Fauquier never contemplated that any voters should be taken from Gravenhurst to the unorganized tracts.

The learned Judges concurred in delivering judgment to the effect following:

(1) That a person, the owner of real estate of the value of \$200 or upwards, anywhere within the electoral district, has the right to vote at any polling place in the unorganized townships in the electoral district where he may happen to be on polling day.

(2) That where the real estate on which such person relies as his qualification to vote is situate in one of the unorganized townships, his right is to vote in any of the unorganized townships, without being restricted to the township where his property may be situate.

(3) That to entitle a person to vote in the unorganized townships on the qualification of householder, he must be a householder—that is to say—have his qualification as such, within the limits of the unorganized townships.

Upon the further question, in regard to the hiring of teams for the purpose of carrying persons from Gravenhurst to the township of Gibson with the intention of voting, and the supplying of meat and drink to those persons :

PATTERSON, J. A., held that the qualification of the persons, or their right to vote, is something quite foreign to section 154—that the hiring, meant is to convey persons with the intention of their voting—and that here there was a violation of that section ; that section 153 requires that the persons to whom meat and drink are given must be voters ; he did not think he could extend that to section 154 ; Johnston, however, came within section 153, so far as supplies given to him were concerned, and he did not see any escape from holding that the section was violated.

PATTERSON, J. A., then proceeded as follows :

Then comes the question as to whether this, which was a corrupt practice within the term of the statute, was done by an agent of the respondent. I must say, speaking for myself, and I think probably speaking also for my learned brother, there are very few cases in which agency has been held proved by anything short of direct evidence of the appointment, in which the evidence of agency is more conclusive than in this case which is before us. We have here one leading fact, namely, that this particular kind of service had to be done by some one. Of course it was not expected that every man who was a householder, and could not vote in Gravenhurst, would himself find his way out to Gibson. That is a matter which received no support at all from experience or the likelihood of things : it receives no support at all from the evidence given by Mr. Marter, who was one of the most active men in that particular neighborhood ; nor from what actually took place, according to the evidence, there or elsewhere. The people who had not votes in Gravenhurst had at least to be asked to go out. When we come to discuss the question of the

agency, the fundamental fact which settles the question in ordinary cases, is whether the persons who are charged as agents were the friends who were authorized on the part of the candidate to solicit the votes of these people; I do not say illegally and corruptly, or to use any particular course with them, but to negotiate with them upon the subject of their votes? Now, we have the evidence distinct and clear, that it was deemed a matter of consequence to get out this particular class of people. We have, independent of the question of this particular class of people being taken out, the fact which appears that something must be done for the purpose of what is called working the election. We have the statement of the respondent himself, who shows that while he undertook to do all he could himself, while he was very active, energetic, and laborious in going from place to place, and holding meetings at considerable distances apart—two meetings every day during the period between the nomination and the polling; that these other details he was not concerned in carrying out. Then we have further the evidence of Mr. Marter, which shows that he and others there were active. It shows that Anderson and a number of others from outside the constituency came there for the purpose of assisting in the election; that from the first they were in direct communication and co-operation with Mr. Marter who was a member of the general association, and that they concerted measures with him (Marter); that the first thing done was to map out the district, and to mark out the points where different parties were to go for the purpose of carrying on the operations in which they were to be engaged; that in consequence of this concert and organization they go out in different directions, where each man was presumed to do what he could towards furthering the election of the respondent. Then we have the additional fact that, three or four days before the day of this expedition, the respondent himself comes to Gravenhurst, and is there informed by one Madill, who is there with Anderson, that they were assisting in the election. There is so far from being any

assertion on his part that Anderson had no right to interfere in the election, or to go out and do what he could not do himself, an absence of any such disclaimer ; in fact, the evidence is the other way. There is not a shadow of doubt on the evidence, that the assistance was not only not repudiated, but was accepted, and was made available on the part of the respondent. To hold anything else would be to do violence to the ordinary capacity one is supposed to have in drawing inferences from the evidence given. There is, on the whole of the evidence given, respecting these people, Anderson as well as the rest, but one conclusion to be arrived at, and I think the grounds for that conclusion have been more distinctly and clearly shown than in most cases of the kind, that Anderson must be held, and those persons acting with him also, to have been agents of the respondent. There is a good deal of evidence in connection with them ; whether it is evidence that becomes important to discuss or pronounce upon just now, I have scarcely any decided opinion, because it is evidence which may have to be collated with evidence that has been given with respect to other charges upon which we have yet to hear more, both in the way of evidence and argument, that is evidence of this contest being carried on by funds supplied from elsewhere, through these persons—by which these particular operations in question were conducted, and by which the other things they thought necessary to be done were provided for—such as the paying for canvassing, which was done by Marter with money supplied by Anderson, and so forth. I do not think, for the purpose of disposing of this particular charge, namely, the commission of corrupt practices by an agent of the respondent, it is necessary to go into detail on the question of the mode in which this part of the election was conducted ; it seems to have been carried on with money wherever it came from. It may become of importance when we hear more about it, as probably the respondent may be able to produce these people through whose hands the money went. We know at present that money did come from somewhere, and was spent in this particular way.

FERGUSON, J.—I have but little to add ; one view there is, however, that I am not quite sure my colleague entertains ; it is this, apart from any connection with the particular transaction under consideration, that is the sending of voters to the unorganized territory, the hiring of teams, and the supplying of meals, I think the agency of Anderson is proved, supposing there were no more than what occurred between Anderson and the candidate himself. He was told in the forenoon Anderson was there, and for what purpose ; he went to the village to hold his meeting ; he did not stop in the same hotel in which Anderson stopped ; after the meeting, knowing that Anderson was in the other hotel, and knowing the purpose for which he was there, he went to his room—the subject of the conversation was the meeting, the election, and the probable result ; there were people there, and there were lists there ; I think, if there were not more—and there is a great deal more—that would be sufficient to prove agency ; I do not see how it can be otherwise on the evidence, and I do not see how it ought to be otherwise, in common sense. Then, assume Anderson to be an agent, and without taking into account any more than that Anderson furnished money for doing what would be a corrupt practice by an agent—that would be a corrupt practice on his part : that is the view which has occurred to me from the beginning, and I think it is the correct view.

Certain personal charges against the respondent Fauquier were then taken up, by which he was charged with violating sections 151 and 152 of the Election Act in the matter of providing and paying for meat, drink or refreshments.

After taking evidence the Court adjourned until September 3rd, 1883, when judgment was delivered at Toronto.

The judgments fully set out the effect of the evidence.

PATTERSON, J. A.—The respondent, Mr. Fauquier, was shown by his own evidence, as well as by that of other witnesses, to have violated section 151 of the Election

Act, which forbids any candidate or any other person to provide or furnish drink or other entertainment at his expense, to any meeting of electors assembled for the purpose of promoting the election, previous to or during such election.

The occasion was a public meeting, held by the respondent, at a place called Commanda Creek ; the meeting was held in the dining-room of a tavern kept by one Fitzgerald, and consisted of about sixteen persons, who were not all of the same political party with the respondent. As soon as the proceedings closed (that is to say, when every one had spoken who wished to address the meeting on either side) nearly all those present crossed the hall and went into the bar-room ; the respondent followed, first inviting the few who remained, including one gentleman who had spoken in opposition to him, to join them ; and then, in the bar-room, he invited them all to drink, which they did, the respondent paying for the liquor ; this was on the 23rd of February ; the respondent had been chosen as their candidate, by a convention of his party, on the 15th of February ; the nomination day was on the 27th of February, and the polling was on the 13th of March.

We had, before the investigation of this charge, declared the election void, by reason of corrupt practices committed by agents of the respondent ; had this not been so, it would necessarily have been avoided, under the effect of section 158, by the violation by the candidate of section 151, which is a corrupt practice.

The questions which we reserved for consideration, and with which we have now to deal, are those which arise under sections 161 and 162. The former of these sections, in addition to the avoidance of the election, attaches to the candidate found guilty of a corrupt practice, the incapacity, during the next eight years, of being elected to, and of sitting in, the Legislative Assembly, and of being entered in any voters' list as a voter, and of voting at any election, and of holding any office at the nomination of the Crown, or of the Lieutenant-Governor of Ontario, or any

municipal office ; but section 162 provides that in certain circumstances the candidate shall be relieved from this severe penalty.

This section declares that, if it appears to the Court or the judges trying an election petition, that an act constituting in law a corrupt practice was committed by a candidate, or with his knowledge and consent, he shall not be subject to the penalties and disabilities under the preceding section, provided four things occur :—

Firstly. The act which constitutes in law a corrupt practice must have been committed, or consented to, without any corrupt intent.

Secondly. It must have been committed, or consented to, in an ignorance which was involuntary and excusable.

Thirdly. The evidence must show that the candidate honestly desired to have the election conducted according to law.

Fourthly. The evidence must also show that the candidate, in good faith, endeavored, as far as he could, to have the election conducted according to law.

This is the first time, so far as we are aware, that it has become necessary to apply these provisions to the facts proved upon the trial of an election petition ; we have, naturally, considered them with anxiety, and may have to refer at some length to matters which have appeared from the evidence given before us during the trial, and which seem to bear upon the application of the section to the case of the present respondent.

The respondent was, as I have said, chosen by a meeting of members of the Conservative party, which is sometimes spoken of as a convention, on February 15th. He at once addressed himself energetically to the work of his canvass, and he held no fewer than thirty-two meetings in different parts of the very extensive electoral district during the four weeks which intervened between the day of the convention and the polling day, holding generally two meetings a day. There is nothing before us to suggest that in the selection of the respondent or his acceptance of

that nomination, anything was in contemplation but a fair and honest contest ; if it assumed a different character at a later stage, that may have been the doing of others than the respondent or those with whom he acted at the outset ; but it is impossible to consider the questions before us without reference to those later proceedings. It is clearly established that a number of persons, who seem to have had no connection with the district, came into it some eight or ten days before the election day, for the purpose of aiding in the contest ; one party came to Gravenhurst ; there were eight or ten of them, the leader being apparently a Mr. Anderson. We are indebted to Mr. Marter of Gravenhurst, an active and influential supporter of the respondent, for an account of some of the proceedings there, which in its candour and honesty was in marked contrast with the evidence given by some of the other witnesses. Mr. Anderson and his companions, after conference with Mr. Marter and others of the party, separated, Anderson remaining at Gravenhurst, and the others going to different localities in the district. Another party, which included persons named Shields, Pringle, and Smith, came to Bracebridge, where they were in communication with some of those friends or agents of the respondent with whom he appears to have more directly associated, particularly Mr. Mahaffy, his financial agent, and Mr. Roper, who conducts a private bank under the name of the Muskoka Banking Company ; and also with others who, though not so directly associated with the respondent, were clearly his agents in contemplation of law, as we held in the cases of Messrs. Chantler, Perry, and Nichol. The evidence leaves no doubt upon our minds that the purpose of these persons who came from outside the district was to influence the election by corrupt means. As far as evidence was given of actual transactions, the expenditure of money either in direct bribery, or in other ways which the statute declares corrupt, was shewn in several instances ; there was proved the declaration of one person, through whom money was thus disbursed, that the object was to carry the election if

money would do it; the disbursement of money by Anderson was specifically proved, although I believe the only corrupt act into which it was traced was the hiring of teams to take persons from Gravenhurst to an unorganized township to vote, and the providing for their expenses. A similar expedition from Bracebridge was provided for by money paid through the hands of one Cosgrove; it did not appear who he was, further than that he did not belong to the district. He was not shewn, by direct evidence, to be connected with Shields or his party, but there was evidence enough to justify the inference, if it were necessary to find the fact, that such a connection existed. The evidence is that of Mills who went in charge of the expedition. He had been introduced to Shields at the British Lion on the occasion on which he was engaged to go with the party. He had there met a number of other supporters of the respondent. He has mentioned the names of some of them, including Mr. Roper, Mr. Perry, and a Mr. Tookey, the Reeve of the Township of Macaulay, in which township Mills lives; he tells us that the subject of the expenses of the expedition was not mentioned in the room where he met these gentlemen, but outside he spoke of it to Mr. Tookey, who assured him that the expenses would be paid. He conveyed that assurance to the men who went, and it was made good by the appearance of Cosgrove with the money.

A sum of money, which was spoken of by Roper as \$1,000, was remitted to him, or to the Muskoka Banking Company, by a bank draft, and was handed by him to Shields. This was one of the incidents respecting which we felt we were not put in possession of the whole truth. As told to us the transaction was far from bearing the aspect of an ordinary business transaction. Mr. Roper told us that Mr. Shields enquired if he could cash a cheque for one thousand dollars; and being told that he could, there comes, after some days, a bank draft not payable to Shields or requiring his endorsement, but payable to the Muskoka Banking Company; and, as far as confided to us, without

any advice or information about it but what Shields verbally gives to Roper, who upon that voucher alone hands him over the money. The inevitable conclusion that that money came for election purposes is entirely consistent with what is proved respecting the illegal expenditure of moneys, even though no part of the specific remittance may be traced. These are not the only bits of evidence on the subject of the money sent into or used in the district; amongst other information there is that given by Mr. Burk respecting his trip to Lake Nipissing with some \$400 in his pocket; although finding, as I gather from his account, that he had been anticipated by some one else in the work of bringing forward the voters working on the Canadian Pacific Railway, he only paid his own expenses and brought back the greater part of the funds. Then there is the evidence of the payments on which we have had to pronounce, and of sums mysteriously received by voters through the post office or otherwise, and the evidence of the taking of trunks containing whiskey with them by those persons or some of them who went to promote the election in various parts of the district. The result of all this is the conviction that, to whomsoever the scheme is to be attributed, there was an organized and systematized plan to employ means which are either corrupt in themselves or are stigmatized by the statute as corrupt, in influencing this election; and that it was part of the system to bring those means to bear as generally as possible through all parts of the electoral district; this circumstance, apart from the actual proof of individual acts of corrupt or illegal character, has to be borne in mind in our present enquiry; it has also to be remembered that the subject of the vote in the unorganized localities has been, as explained to us by Mr. Marter, a part of the general plan decided upon by the members of the Conservative party in the district itself. He gave us to understand that the Conservative party had formerly acted upon the view of the statute adverse to the right of a man to vote in an unorganized township when he was not a resident householder in

any unorganized place, and when he did not own property anywhere in the district of the value of \$200, but that as the Reform party had polled such votes, the Conservatives had decided, partly for that reason, and partly from something understood to have been said in the Legislative Assembly by Mr. Mowat, to poll such votes on this occasion. He did not speak of this as a matter which had been debated at any meeting of the Conservative Association, but as something which had been talked of, and had come to be understood as part of the plan of the campaign. This was all known to the respondent. Mr. Marter also explained, and indeed it was rather made a point on the part of the respondent when one of these charges was under discussion, that the voters, or assumed voters, could not be got out to the remote polling places without hiring teams and supplying provisions for the men. The respondent spoke as if he had taken it for granted that enough teams would be volunteered by their owners to take these people to the polls; but, if we accept the statement that he knew so little of what practical men like Mr. Marter speak of as a matter of course, and which the fact that the teams had to be hired when the time came proves to have been a necessary part of the undertaking, there still remains the supplying of the provisions, and in that way paying the expenses of the voters which some one had to do, as there is no suggestion that the voters were expected to pay their own expenses, or that they were people who had the means to do so.

Now, with this glance at the general character of the contest as conducted by some of those most active on the part of the respondent, let us return to the section 162.

Of the four things which have to concur for the relief of the candidate, the first two relate to the time of the commission of the corrupt act; the other two to the whole contest. The act may be committed or consented to inadvertently, without any corrupt intent, or in an ignorance such as the statute speaks of, whatever its precise meaning may be; but that will not excuse, unless there is

through the whole contest the honest desire, and the honest endeavour to have the election conducted according to law. How are we to deal in the present case with these last requirements? Is it possible to reconcile the facts to which I have adverted—the systematic and designed infringement of the law by those so active in the election as those strangers to the district and those who acted with them were—all of whom were persons for whose acts, as his agents, the respondent would most probably be responsible—with the honest desire and the *bonâ fide* endeavour, on the part of the respondent personally, to have the election conducted in a different manner? Such a conclusion might not be impossible in every case. It is possible to imagine the case of a gentleman who offers himself, or accepts an invitation, to run as a candidate, with the strongest desire and determination to observe in good faith all that the law requires, finding the cause taken out of his hands by persons actuated by a different spirit, and with whose course he refuses to concur. Such supporters might jeopardize or destroy a good cause; but it would be unjust to visit personally with the consequences of their misconduct the candidate against whose desire, and in spite of whose endeavours they had persisted in their corrupt practices. We have considered the evidence in this case with the desire to find ground for regarding the respondent in this light; but we regret to have to say that we cannot do so upon any fair treatment of the evidence. It may be that, even if we assume that the respondent commenced his contest with no idea of violating the law, and that the efforts made by others to aid by irregular methods were only known to him, if they were known, at a late period, it would be expecting too much from him to look for active steps by way of public denunciation or repudiation of the of the powerful aid they were bringing. The temptation to benefit by their conduct may have been irresistible, or other causes than his personal wishes may have prevailed to check any attempt at interference with those who had come to take part in the contest, if not to control it; what-

ever the reasons were, we have to look at the fact that no repudiation or disclaimer is shewn.

It would be rather taxing credulity to ask us to assume that while a course of the character I have alluded to was being pursued in so many parts of the electoral district by persons who were strangers there, with little or no pretence of secrecy, and while the respondent was passing from place to place canvassing and holding meetings, no whisper of it should have reached the ears of the person chiefly interested. One could not so assume, without tolerably convincing proof; and under the statute affirmative evidence is required; but, unfortunately for the respondent, whatever evidence there is accords with the presumption of his knowledge; not necessarily knowledge of any specific act of a corrupt nature, but knowledge of the general nature of the tactics likely to be resorted to. That evidence is mainly what we are told of the interviews of the respondent with Anderson and with Shields; that with Anderson is spoken of by the respondent himself, and by at least one other witness, I think, Mr. Marter; election matters were the theme of their conversation; though, as it was late one evening, after the respondent had done a hard day's work, little may have been said; nothing in deprecation of illegal practices such as were then planned at Gravenhurst, and such as Mr. Marter tells us could not be avoided in sending men to the unorganized townships, is shewn to have then been said; yet, we should possibly hesitate to hold, from what we know of that interview alone, that the respondent knowing or suspecting that corrupt practices were being resorted to, connived at them. But the interview with Shields is told in a different way. We have the respondent's own avowal that he purposely avoided the mention of election matters to Shields, and that Shields was equally guarded in speaking to him; in the face of this, we cannot see our way to say that it is shewn by the evidence that the respondent, in good faith, endeavoured as far as he could to have the election conducted according to law, or, that he honestly desired that these

people should confine their exertions within the limits which the law permitted ; it is not enough to say that he carefully endeavoured to avoid personally doing, or involving himself in any illegal practices ; it is his desire and endeavour with reference the general conduct of the election which we have to consider.

Thus we are compelled to hold that the respondent has not brought himself within either the third or fourth of the requisites of section 162.

It is possible that our view of the evidence as it applies to these may influence our conclusion as to the first and second requisites ; but, upon them also we are unable to come to a decision in favour of the respondent.

First. Was the treating of the meeting done without any corrupt intent ? An attempt was made to bring the case within the doctrine held in some cases in our courts when, upon the question whether a particular instance of treating was or was not corrupt, weight was given to the fact that the custom of treating was very general, and only a token of good fellowship, and that the person charged habitually treated persons whom he met at taverns. The respondent was asked as to his habits in this respect, and assented—though, as it struck me, but faintly—to the suggestion that such was his habit. I may be allowed to say that the respondent is a gentleman of whom I had formed a better opinion than that which he then claimed for himself, and I should be very unwilling to believe that he had so far receded from the traditions which he must have brought with him, as to have fallen in with the vicious and destructive custom of which we are compelled to hear so much ; but the cases in which the matter has before arisen were cases in which it was necessary to shew affirmatively that the treating was corrupt. Even from that point of view they gave, I think, quite as much effect as could reasonably be given to the proof of the habitual character of the treat. For my own part, were the argument addressed to me that a man ought not to be charged with a corrupt intent because he felt compelled to treat to avoid

the imputation of being mean or unsocial, I should feel it hard to resist the reply, that if he feared that imputation would hurt his election, the corrupt intent in treating was not negatived.

In the present case we have to look at some circumstances which I have not yet stated. The treating on February 23rd, at Commanda, was not the only instance of which there was evidence, although it was the only one with respect to which we decided that a meeting was treated. A couple of days earlier the respondent had had a meeting at Burk's Falls, and after it was over he ordered liquor for a number of men who were with him in the sitting-room of a hotel; one of them, a Mr. Sharp who was a personal friend though a political opponent, expressly called the attention of the respondent to the danger of violating the statute by treating. It is not perfectly clear whether he had in his mind the treating of a meeting under section 151, or the corrupt act of treating by a candidate forbidden by section 152, or indeed that any specific provision was thought of. The fact is not denied that attention was called to the subject, and the respondent candidly tells us that he had reasoned about the matter, though, as he says, in ignorance of the precise provisions of the statute; and thinking that until the formal nomination had taken place he was not a candidate, he concluded that until that time he might safely continue to treat. It is very difficult to perceive how we can, consistently with what the respondent thus told us, regard the treating as free from any design on his part to influence the election. It was at his election meetings, and it was continued, or intended by him to be continued, up to that time at which, under his erroneous reasoning, he considered he should for the first time be properly considered a candidate. I am by no means convinced that if the respondent had happened casually to drop into a gathering such as one of these, he would as a matter of habit or custom, or under any idea of the calls of good fellowship, have felt it incumbent on him to treat all present; and, as I have

already said, I should hesitate before holding such a consideration at all conclusive; this is more especially so when the absence of corrupt intent has to be affirmatively shewn.

What is the exact force intended for the words, "an ignorance which is involuntary and excusable," I do not pretend to say; I do not know whether ignorance of fact or ignorance of law is meant: probably both. After deciding, as we do, upon the other requisites of section 162, it is not important to enquire closely what the phrase should be held to mean. The respondent told us that he had been promised a copy of the Election Act, but had not received it. He would scarcely have found in it a correction, in terms, of his notion that a man who was soliciting the votes of the electors for the coming election was not a candidate, though he would have seen that the prohibition to furnish refreshments to meetings of electors, under section 151, is not confined to candidates, but extends to all persons.

To hold that with the knowledge that there was such an Act, and with the means of procuring a copy for himself, or of obtaining access to one, or advice from a legal friend, and particularly after a warning on the precise subject such as that given by Mr. Sharp, a repetition of the practice could be said to have occurred in an ignorance which was either involuntary or excusable, would be to treat the section as relieving the candidate from the exercise of ordinary diligence and ordinary intelligence. If so great latitude in the application of the statute could in any case be justifiable, it would certainly not be so in the case of one who, like the respondent, is a gentleman of education and intelligence.

I may sum up or recapitulate the results of our consideration. We find that the act of the respondent, in furnishing drink at his expense to a meeting of electors assembled at Commanda Creek, for the purpose of promoting the election, which constitutes in law a corrupt practice, while it appears to have been committed in ignorance that it was a violation

of the statute, does not appear to have been committed in an ignorance which was involuntary or excusable.

We are disposed to believe that the respondent was desirous, and that he endeavored to avoid personally committing illegal or corrupt practices, and even to avoid actual knowledge of their commission by others acting in his support ; but we are not satisfied that he was ignorant that such practices were likely to be committed by persons acting on his behalf in the conduct of the election ; and finding that corrupt practices did prevail, and as there is reason to believe did extensively prevail, at the election, and amongst those who supported the respondent, we are unable to say that the evidence shews the respondent to have honestly desired, and in good faith endeavoured, as far as he could, to have the election conducted according to law.

We feel ourselves, therefore, compelled to come to the conclusion that the respondent is not relieved by the 162nd section of the statute from the penalties and disabilities incurred under the preceding section.

FERGUSON, J., said he had nothing to add ; after serious consideration, he fully concurred in the able judgment just delivered by Mr. Justice Patterson.

The respondent appealed to the Court of Appeal, and the appeal was argued on June 2nd, 1884.

C. Robinson, Q. C., and *McCarthy*, Q. C., for the appellant. The respondent fancied the Act R. S. O. ch. 10, sec. 151, did not apply until after his nomination. His conduct was "involuntary and excusable," within the meaning of section 162. He honestly desired to have the

election conducted according to law What the Act was intended for was to put a stop to committee meetings being treated with intent to influence the election. We refer to *Wilberforce* on Stat. Law, p. 247; *The Welland Case*, H. E. C., p. 187; *The Dundas Case*, *ib.*, p. 205; *The West Wellington Case*, *ib.*, p. 231; *The East Peterborough Case*, *ib.*, p. 245; *The North Victoria Case*, *ib.*, p. 252; *The North Middlesex Case*, *ib.*, p. 376; *The Halton Case*, *ib.*, p. 283; *The North Grey Case*, *ib.*, p. 362; *The West Hastings Case*, *ib.*, p. 539.

Bethune, Q. C., *Lount*, Q. C., and *Johnston*, for the respondents, referred to *Wilberforce* on Statutes, pp. 251. 32 Vic. ch. 21, sec. 61, (O.); 39 Vic. ch. 10, (O.)

June 30th, 1884. HAGARTY, C. J. O.—We have first to consider whether the respondent was properly held to have been guilty of a corrupt practice under R. S. O. ch. 10, sec. 151.

“No candidate * * shall, nor shall any other person either provide or furnish drink or other entertainment at the expense of such candidate or other person, to any meeting of electors assembled for the purpose of promoting such election previous to or during such election, or pay or promise, or engage to pay for any such drink or other entertainment, except only that nothing herein contained shall extend to any entertainment furnished to any such meeting of electors by, or at the expense of, any person or persons at his, her or their usual place of residence.”

The respondent had been accepted as a candidate on behalf of the Conservative electors; Mr. Bettes by their opponents.

Printed bills were issued, headed: “Political meeting. Mr. Fauquier, the Liberal Conservative candidate, will address the electors on the public questions of the day at the undermentioned times and places,” (giving a list of times and places, including Commanda,) “February 23rd, 7 p.m. Mr. Bettes is most respectfully invited.”

The nomination was fixed for February 27th. The polling took place March 13th.

Commanda is stated to be a small hamlet of a few houses.

Respondent arrived there in the evening, and about fifteen electors arrived, several of them were his opponents. A chairman was appointed. Respondent addressed them, so did others. They were assembled in the dining-room; there was a door into the passage dividing it from the bar-room, just across the passage. After the speaking, the chairman asked was there any one else to speak? No one did so, and he said he would close it up, or bring it to a close, and the people began to move across the passage into the bar-room. Most of them had gone there. Respondent said to those remaining in the room to come and have a glass. They all went into the bar-room, and respondent repeated the invitation to all there to have a drink. He had said to one of the witnesses before leaving the dining-room, "well, if we cannot agree in politics, we will go and have a drink together." In the bar, after repeating the invitation, they all had a drink, for which respondent paid.

This was held to be a violation of section 151.

It was urged before us that this was not a meeting within the statute.

Chief Justice Draper, in the *Halton Case*, H. E. C., 285, seems to have considered that "a meeting of electors all of one way of thinking to support a particular candidate, or of a committee to aid in his return, at which refreshments were provided at the expense of one or more of them, could not, unless in some extreme case, be deemed a breach of the provisions against treating."

The case was before this Court on appeal on another charge, and it was not necessary to notice the point.

I am not clear, from the report, whether the learned Chief Justice was referring to corrupt treating generally, or to this particular clause.

Chief Justice Cameron, in the recent *East Middlesex Case*, (a) takes an opposite view, and holds that "a general

(a) Post p. 250.

meeting of electors, called to hear the speeches of the candidates, can hardly be deemed assembled to promote the election, as far as those assembled were concerned. They came to hear, not to act, while in the case of the committee it is assembled to act in the promotion of the election ; and when the latter part of the clause is considered it appears to me the latter kind of meeting is indicated very clearly."

Chief Justice Draper, in the *East Peterborough Case*, H. E. C., at p. 251, holds that a meeting attended by both candidates and their friends is a meeting within this clause :

"It is not open to question that the meeting was assembled for the purpose of promoting the election, unless the statute is to receive the narrower construction that a meeting of the supporters of only one candidate is meant, and the promotion of the election means only the promotion of the election of that candidate. I do not doubt that such a case would be within the Act. * * Still I am of opinion that the wider construction is no more than what the Legislature intended. * * Unless the larger construction prevail, a general meeting of electors, held only for the purpose of selecting a candidate, would not be within its provisions, and the providing and furnishing drink or other entertainment to the electors would not be prohibited. I do not agree to such an interpretation."

I am of opinion that the present was a meeting within both the letter and the spirit of the 151st clause.

The object, (amongst others) was evidently to extend to treating as a means of influencing the voters. If a candidate call a meeting to hear him express his views on public questions, it is doubtless done to place himself favourably before the constituency, and the fact of the presence of voters of an opposite political stripe, makes it all the more likely that the candidate would strive to propitiate and win their favour by treating, &c., than if none were present but his own known friends.

He called the meeting, in my judgment, to promote the election or to improve his chances of success by personal intercourse with the voters.

Such treating would be clearly within the mischief sought to be remedied.

It must, of course, be also reasonably within the letter as was pointed out recently in this Court in the *South Victoria Case*, ante p. 182, and in the case there cited of *Philpots v. St. George's Hospital*, 6 H. L. c. 338.

Then it is urged that the meeting was over before the refreshments were furnished.

It was over in one sense that the chairman had formally closed it.

But the voters composing the meeting all remained, part in the dining room, or, as may be said, in the act of a general movement a few feet away across the passage into the bar-room.

The statute says nothing as to any organization of a meeting. It is, I think, clearly a meeting of electors, whether the formalities of appointing a chairman or a secretary had been observed or not.

An evasion of the section could always be readily effected by omitting any formal organization. Fifteen voters might very easily have met and discussed these election matters without placing any one in the chair.

To hold that the section ceased to apply as soon as the chairman formally closed the meeting, would, as it seems to me, be the narrowest possible construction of the clause, and a forgetfulness of both its spirit and letter.

If the Legislature had prohibited any person from wearing any party badge or emblem, green or orange scarf, &c., at any meeting of electors, I think it would be an extraordinary construction to put on the enactment if we held that people could lawfully assemble at the appointed place of meeting decorated with the prohibited badges, &c., and that it would only become unlawful as soon as the meeting was called to order by a chairman, and that as soon as he announced the proceedings to be at an end, every voter present might at once resume his decorations.

This would seem to me to amount to a complete nullification of the enactment, destructive alike to its spirit and its letter.

In the late case of the *Prescott* election, (a) my learned brother Osler—the Court consisting of its late Chief, of myself, Burton and Osler, JJ.A.) used this language after citing the authorities:

“Without attempting to lay down any inflexible rule for the circumstances of each particular case as regards the extent of the treating, the question must, in my opinion always be whether the entertainment has been furnished to *the meeting*; that is to say, to the general body of electors, comprising such meeting, whether before, during or after the business of the meeting, and while, as a body, such electors remain at the place of meeting or elsewhere. I think there is nothing in the cases really inconsistent with this proposition.”

Omitting the words, “or elsewhere,” which may open a wide field of discussion not necessary in the case before us, I accept this enunciation of the law. No member of the Court dissented from, or doubted this view.

I am satisfied that we would wholly nullify the plain words of the Act if we accept the appellant’s construction.

I hold that the meeting called by the respondent remained as a meeting or gathering of voters up to the time when the entertainment was furnished to them.

Assuming that the charge of a corrupt practice has been proved against the respondent, the question for decision remains, whether he has fairly brought himself within the saving clause.

The legislature affixed the penalty of disqualification to certain acts not in themselves involving a corrupt or immoral purpose, but merely a violation of regulations deemed necessary for the free and peaceable conduct of election contests. Cases occur in which the heavy penalty was incurred unwittingly and in ignorance &c., &c.

Then came the remedial legislation, R. S. O. ch. 10, sec. 162. “If it appears to the court or the judges trying an election petition that an act constituting in law a corrupt practice was committed by a candidate or with his knowledge and consent, (1) but without any corrupt intent, and

(2) in an ignorance which was involuntary and excusable, (3) and that the evidence shewed the candidate to have honestly desired and (4) in good faith endeavoured as far as he could to have the election conducted according to law, the candidate shall not be subject to the penalties and disabilities which he would but for this section incur under the next preceding section."

When the corrupt practice is proved the burden of proof is of course at once shifted to the respondent to bring himself affirmatively within the saving clause.

The candidate may safely pass through the peril of disqualification by the weakness or want of directness in the evidence adduced against him, and the tendency of decision has always been in favour of his innocence of corrupt motive or practice, and his guilt has been required to be proved with reasonable certainty.

Here the proceeding seems reversed. He is adjudged guilty. He has now to convince his judges that he has fairly brought himself within the saving clauses in the section quoted.

The learned Judges Patterson and Ferguson, after very full consideration and a most elaborate and careful examination of the whole case, pronounced with regret their inability to find that the respondent had convinced them of his being fairly within the provisions of the saving clause. I have examined with the most anxious care the very careful judgment of the learned Judges and the voluminous evidence on which it is based.

I feel the gravity of the decision as against the respondent, and the gravity of our position as appellate Judges urged on his behalf to over-rule the decisions at which the judges have arrived. It is, of course, not disputed that the Appellate Court has the undoubted right to review the decision. The Legislature provides in effect that if certain specified matters are proved to their satisfaction they may absolve the candidate. They decide that such matters were not proved. We, of course, have the power to say that they ought to have found them proved.

The latest of the many utterances on this subject seems to be that of Lord Blackburn this year in the Lords: *Smith v. Chadwick*, 9 App. Cas. at p. 194.

"The Court of Appeal ought to give great weight, but not undue weight, to the opinion of the Judge who tried the case and saw the witnesses and their demeanour. That gives him considerable advantage over those who only draw their information from perusing the notes. But still, though the Court of Appeal ought not lightly to find against the opinion of the Judge who tried the cause, I think that the Court of Appeal, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way."

We therefore, if we allow this appeal, must be "convinced" that the learned Judges below ought to have drawn the inference from the evidence which they declined to draw.

It has been also held very lately in *Jones v. Carling*, 13 Q. B. D. 262, that under the Judicature Act, the costs shall, on a jury trial, follow the event unless the Judge, on application then made for good cause shewn, shall otherwise order. This power is given in a section beginning with a direction that the costs of all proceedings shall be in the discretion of the Court. The Court of Appeal reversed Lord Coleridge's order refusing costs on the ground that it was not made on "good cause."

I will not attempt to review the voluminous evidence on which the learned Judges based their finding. It is fully stated in the judgment delivered.

I agree in the opinion there expressed that there was a good deal of bribery at the election; that certain persons came into the county for the purpose of carrying the election by illegal means, and that such means were practised by some of them: that money was freely used, and that the mission of these persons and the practices resorted to by them was tolerably well known in the constituency, and that the respondent was engaged in a most

active personal canvass for a considerable time over most of the county, in constant communication with the electors and his friends and supporters.

The respondent admits that he intentionally avoided having any conversation on the subject of the election at a short interview that he had some days before the polling with a Mr. Shields, a person who, rightfully or wrongfully, seems to have acquired some marked reputation for interfering in election contests. The respondent also stated that at this interview Shields knew better than to talk about the election to him. There was no evidence of any illegal act done by Shields, and the respondent swore that he had never known him before this meeting, and knew nothing of his character or of his interference in political matters.

A good deal of evidence was adduced as to treating, and as to respondent's knowledge, or means of knowledge, of the law on that subject.

If the case had turned solely on the question of the respondent's violation of the 151st section as to treating at Commanda Creek, I would have had to differ, I think, from the judgment below, and would have held that he did it without corrupt intent, and in an ignorance involuntary and excusable. I would have accepted his assertion on that point.

I do not think, until his being warned, that he was aware of its illegality, and hardly believe he would knowingly have jeopardized his election by such a violation of the law, especially in presence of known political opponents.

My difficulty arises on the other requirements of the statute, the proof required from the respondent of his having honestly desired, and in good faith endeavoured, as far as he could to have the election conducted according to law.

I do not propose to review the voluminous evidence. All its salient points appear in the judgment at the trial. The decision of this Court must be read after a perusal of that judgment.

With the most unfeigned anxiety on my part to give a possibly innocent man the benefit of every reasonable doubt in the case made out against him, with a full sense of my right and of my duty to give my independent judgment on the case laid before us, whatever may have been the opinion of the Judges at the trial, I have arrived with regret, at least as sincere as that expressed by these learned personages, that I cannot join in reversing their deliberate decision on the other points of the case. I am not "*convinced*" (as Lord Blackburn puts it) that the inferences drawn from the evidence by the Court appealed from ought not to have been drawn. Had they thought themselves justified, after hearing and seeing all the witnesses, in expressing themselves satisfied that the respondent had fairly brought himself within the protecting clause, I should have hesitated long before I could venture to interfere with their decision.

We may give the respondent credit for having honestly desired to keep himself personally free from corrupt practice, and not to put himself in the way of knowing whether others were or were not resorting thereto. The Legislature seems to require something more from the candidate, and he has failed, I fear, to answer that requirement.

I am not prepared to say that I am convinced the finding is erroneous, and therefore must hold that the appeal must be dismissed.

BURTON, J. A.—Two questions are presented for our consideration in this case.

Was the act of which the appellant was found guilty an offence within the statute? and if so, is the construction placed by the learned Judges upon the mitigating clause correct?

The answer to the first of these questions must depend upon whether this was such a meeting as is referred to in section 151, and whether what is alleged to have occurred was the furnishing drink to such a meeting within the meaning of the statute.

Unfortunately, great differences of opinion appear to have existed as to what is meant by the words "a meeting of electors assembled for the purpose of promoting such election," the learned Chief Justice of the Common Pleas holding in a recent case (*East Middlesex post.* p. 250) that section 151 was specially directed against the treating of committees composed of electors, and that a general meeting of electors called to hear the speeches or addresses of the candidates can hardly be deemed assembled to promote the election as far as those assembled are concerned. They come, he says, to hear, not to act, while he says in the case of the committee, it is assembled to act in the promotion of the election.

With great deference, it seems to me that such a construction would be to give to the words used by the legislature a much narrower meaning than they bear in their natural and ordinary sense. If such had been the intention of the legislature we should rather have expected them to say, to any "meeting of electors assembled to promote the election of such candidate"; and besides it must not be overlooked that the section is directed not only against a candidate, but against every person so offending shewing, I think, very clearly that the words "for the purpose of promoting such election" have reference to any meeting assembled in connection with, and in furtherance of, the object of electing a representative in the Legislature, and are not confined to meetings of the supporters of a particular candidate. The late learned Chief Justice Draper, in the *East Peterborough Case*, H. E. C, at p. 251, expressed himself clearly to that effect. "I do not doubt," he says, "that such a case" (referring to a meeting of the supporters of only one candidate) "would be within the Act, and the evidence on the present trial is by no means conclusive against this being precisely that case. Still I am of opinion the wider construction is no more than what the legislature intended. If the meeting consists of electors of different parties, and it is held with the view of promoting an election, it must necessarily be an election of a represen-

tative for the whole constituency to whatever party he may belong. Unless the larger construction prevail, a general meeting of electors held only for the purpose of selecting a candidate, would not be within its provisions, and the providing and furnishing drink or other entertainment to the electors present, would not be prohibited."

I should have been inclined to think, but for the concluding words of the section, that committee meetings were not intended to be included; but it is quite possible that the Legislature, with the knowledge of the facility with which these enactments are frequently evaded, have thought it desirable to include all kinds of meetings of electors in any way concerned in the promotion of the election, making the prohibition as wide and general as possible, and then excluding from the operation of the enactment the furnishing of entertainment to such meeting (presumably, in such connection, a committee meeting) at the usual place of residence of such candidate or other person.

I think some of the apparent discrepancies in the decisions may be attributed to a want of care in ascertaining under which enactment the decisions were given. There was much reason I think in the contention that section 61 of the Act of 1868, where, in addition to the treating, it was necessary to show that it was done with intent *to promote the election of the candidate*, was confined to furnishing entertainment to a meeting assembled for the purpose of promoting his election; but under the present enactment no such intent need be shown, and the meeting referred to is a meeting assembled for the purpose of promoting such election, referring not to the election of the candidate, as in the former statute, but the election of a representative of the electoral district to serve in the Legislative Assembly,—the only election previously referred to in the Act.

My own opinion is that we cannot, without restricting the language of the legislature, hold that any meeting of electors assembled for promoting the election, whether

that meeting be a mixed meeting or a meeting of a candidate's own supporters or a committee meeting, is excepted from the operation of section 151, unless such meeting be held and the entertainment supplied at the usual place of residence of the party furnishing it; and I need not add, therefore, that I agree with the learned Chief Justice that the meeting in question came clearly within the enactment.

Then was what took place here a treating of that meeting? To hold otherwise would be in effect to repeal the Act of Parliament. My brother Osler, in delivering judgment in the *Prescott Case*, ante p. 88, placed a construction upon the words of the section which was fully concurred in by the other members of the court, and appeared to me to be the only effectual mode of construing the enactment, and I agree that we should nullify the enactment were we to adopt any other construction. The formality of appointing a chairman or organizing the meeting would be everywhere dispensed with; and yet I think no Court could be gravely asked to hold that the Act did not apply if a body of people so assembled were invited by any one to accept a treat.

That is precisely what was done in this case; the whole body thus assembled was invited to go into the bar and partake of drink at the expense of the candidate.

I can scarcely consider it worthy of serious consideration as an element in our decision, that two or three of the persons assembled had crossed the threshold of the room in which they were actually holding the meeting, on their way towards the bar-room, at the time this invitation was extended to all.

Looking at one of the mischiefs which the Legislature had in view when passing the enactment in question, viz., keeping the peace and good order at elections, it is obvious that if the prohibition were restricted to the actual meeting strictly so called, it would do but little towards removing one of the evils at which it was manifestly aimed, namely the furnishing of intoxicating liquor to persons assembled or called together at election times, when the

feelings of the opposing parties are likely to be much excited.

That excitement would be intensified by the furnishing of intoxicants, and would increase the tendency to tumultuous and riotous discussions, ending as we all know they frequently did in former times, in scenes of violence and bloodshed.

I should say, therefore, that a very wide meaning should be given to the words of the section with the view to prevent the mischief, and that until the body so gathered together had actually separated, and had resolved itself into its original elements so to speak, it would be a very dangerous experiment for a candidate to indulge in a general treat to the people thus gathered together, and I think it is as well that it should be generally known that the Courts are disposed to place a very wide construction upon the words, with a view to suppress the mischief.

In the words of one of the witnesses, a general invitation was extended to all, and all present could hear it. That being so, the candidate was guilty of what the legislature has made a corrupt practice.

Whatever then may be our opinion of the propriety of visiting a candidate or other person with so severe a penalty for an offence involving no moral turpitude, but merely made a corrupt practice by Act of Parliament, it is not left to our discretion to adjudicate upon it, the fact being established the penalty follows as a legal consequence. The party found guilty is "*ipso facto*" disqualified.

It might perhaps have been more in accordance with popular sentiment if such matters as these and others had been left as they were at one time, to be mere illegal practices subjecting the party guilty of them to a penalty, and then if a candidate were found guilty of any practice involving a corrupt intent, to leave him without any possibility of relief at the hands of any one. It is sufficient to say that it is not for us to offer any opinion on the subject, but to administer the law as we find it.

The matter did not, however, escape the attention of the legislature, and no doubt, with a conviction that under so stringent a law cases of hardship might arise, they have enacted, by section 162, that if it appears to the Judges trying the petition that an act constituting in law a corrupt practice, was committed by a candidate, he shall not be subject to the penalties and disabilities imposed by the statute if they find,

1. That the act itself must have been committed without any corrupt intent.

2. That it was committed in ignorance which was involuntary and excusable.

3. If the evidence shows that the candidate honestly desired to have the election conducted according to law.

4. That the evidence further shows that the candidate, in good faith, endeavoured, as far as he could, to have the election conducted according to law.

The learned Judges have found, and it is impossible for any one of ordinary fairness and candor, after a perusal of the evidence, to doubt the correctness of their conclusion that a number of persons visited the district, some of whom have attained an unenviable notoriety throughout the Province for corrupt practices in elections, and that the object of their visit on this occasion was to influence the election by corrupt means, and that it was proved by one agent of the candidate through whom money was disbursed that the object was to carry the election if money would do it.

A variety of acts were proved, upon which the election was set aside; and the Judges have found, upon evidence which is more than abundant, that there was an organized and systematized plan to employ corrupt means to influence and carry the election, and that it was part of the system to bring those means to bear, as generally as possible, through all parts of the electoral district; that a part of this general plan was the mode of dealing with the votes in the unorganized localities, which involved the scheme of sending persons not qualified as voters, and

not resident householders in an unorganized district, and not owning property anywhere in the district of the value of \$200, to vote at a polling place in the unorganized district. Large numbers of persons not qualified to vote were sent from villages into these unorganized districts, men who were notoriously unable to bear the expense of going there, and the fact of such a scheme existing, and that these persons were sent was known to the candidate. He says that he assumed that teams would be volunteered for the occasion, but he knew that these men could not live upon air. Are we then to quarrel with the conclusion of the learned Judges, when they refuse to believe that this gentleman, a resident of the district, well acquainted with the settlers and their means, moving constantly among them during the contest did not know what every practical man in the district did know?

In point of fact large sums of money were expended in procuring teams and provisions, including large supplies of whiskey, for the purpose of taking these persons to cast votes to which they were not entitled in favor of the appellant. We must, even as judges, take notice that in a sparsely settled country like that in question people are pretty generally informed of their neighbors' actions, and therefore that the presumption is very strong in favor of the view that the details of these transactions must have been known to him, unless he chose wilfully to shut his eyes.

Speaking for myself, I am always unwilling, except upon the very clearest evidence, in view of the general practice of treating which prevails throughout the country, to hold that treating is indulged in with a corrupt intent.

It is not of course necessary to show an intent in order to establish the corrupt practice under section 151, but in order to remove the disqualification the appellant had to satisfy the judges that no corrupt intent existed.

I understand some of the learned judges' remarks, to which such strong exception was taken upon the argu-

ment, were made with the view of illustrating the difficulty of dealing with the case when the onus was shifted, and a person convicted of the offence was endeavoring to get rid of the penalty, and upon whom therefore the duty was thrown of shewing that there was no corrupt intent.

Here, he says in effect, is a gentleman to whom I may assume, from his antecedents, this indiscriminate pot-house treating must have been repulsive. I could not say, perhaps, if I were dealing with it as a charge of corrupt treating, that it was made out, because it would be in the nature of a *quasi* criminal charge, and I should feel bound to give him the benefit of the doubt. But here he is, after conviction, endeavoring to get rid of the penalty, and with this assumption that the practice must have been foreign to his usual practice, can I say that he has satisfied me that there was no corrupt intent? I do not understand that there was any express finding, but only an intimation of opinion; but if the Judges had expressly so found, could we, as an appellate court, say that they were wrong?

For the same reasons I find it impossible for us to say as an appellate tribunal that the learned Judges were clearly wrong in holding that a gentleman who was seeking to attain the position of a law maker, after being warned of the risk he was running, deliberately continued the practice, because he chose to place an interpretation on the statute that he was not a candidate till nomination day, whereas the mere reading of the clause must have satisfied him that it applied to any person, candidate or not.

If the statute means anything, it must surely extend to such a case. It cannot be said to be involuntary, something that he was surprized into, or did without a moment's reflection. He said he had been advised as to what he could do, and what he could not do.

But it is really upon the remaining portion of the 162nd section that the question turns. I have already referred to the finding of the Judges as to the general system of organization for corrupt purposes by persons taking so active a part in the election as the strangers I have referred

to were taking, and that it was out of the question to suppose that these acts were carried on without the knowledge of the candidate. The learned Judges say it would rather be taxing credulity to assume that these things could have been pursued in so many parts of the electoral district by persons who were strangers there, with little or no pretence of secrecy, without his becoming aware of it, and were we to hold differently, it would go far to destroy the confidence of the community in the efficiency of Courts of law as tribunals for the trial of these petitions.

A careful perusal of the evidence has satisfied me that what occurred in this electoral district cannot be better described than in the words of Mr. Justice Gwynne in the *London Case*, 24 C. P. at p. 474 "that the pre-arrangement or understanding tacit or express between the parties was that the candidate should be kept in ignorance of the particular separate and distinct acts of bribery committed, whilst he was aware, as he could not but be upon any rational principle, that corruption and wickedness upon a most extensive scale were being daily practised around him on his behalf, and in his sole interest."

No one with the slightest knowledge of human nature and an acquaintance with the ordinary affairs of life, could have arrived at any other conclusion than that the appellant knew of these transactions, and had the learned Judges come to any other conclusion there are hundreds of individuals in the district who would have been forced to the reflection that these trials were useless and ineffective.

It may be quite true that Mr. Fauquier may have been placed in an embarrassing position by his friends; that he might have felt that any endeavor to interfere with them might jeopardize his return. But then he took another risk—that which has happened—of his being found guilty of a corrupt practice, and of the burden in that case being thrown upon him of showing that he, in good faith, endeavored, as far as he could, to have the election conducted according to law, and that he honestly desired that these

strangers should confine their exertions within the limits which the law permitted. The learned Judges found that he had not satisfied this onus. Can we say that they were wrong?

I feel that we cannot properly do so, and I concur with the Chief Justice in dismissing the appeal.

MORRISON, J. A., concurred.

GALT, J.—This is an appeal by Mr. Fauquier against the decision of the learned Judges who set aside the election on account of corrupt practices by his agents, and who also gave judgment against the appellant of personal disqualification by reason of a breach by him of the 151st section of the Election Act. The only matter before us is on the latter question, as the propriety of the first is not disputed.

The law and the evidence are so brief that I set them out at length, omitting from the latter such portions only as have no bearing on the question.

The 151st section is: "No candidate for the representation of any Electoral District shall, nor shall any other person, either provide or furnish drink or other entertainment at the expense of such candidate or other person to any meeting of electors assembled, for the purpose of promoting such election previous to or during such election, or pay, or promise, or engage to pay for any such drink or other entertainment." There is an exception added which has no application here.

2. Every person offending against the provisions of this section shall incur a penalty of \$100.

It is also made a corrupt practice by R. S. O., ch. 11, sec. 2, sub-sec, 6.

The evidence is:

"Thomas Carr, Sr.—Where do you live, Mr. Carr? At Commanda Creek. Was there any public meeting held by Mr. Fauquier, or by persons on his behalf at Commanda? Yes, sir.

What hour did it commence? About 7 o'clock in the evening. Who was chairman of the meeting? A gentleman of the name of Boyle.

With whom did he come to the meeting? He came to the meeting with Mr. Fauquier.

What was done at the meeting? Mr. Fauquier got up and spoke for perhaps three quarters of an hour, or near that.

And what next happened, any body else speak after that? Yes, sir. I said a few words.

Any other person speak after you? Yes, another man by the name of Barton had a little to say there.

After that did any person speak? Yes, sir. The chairman got up and spoke.

And what happened next? Well, after that the meeting was brought to a close.

In what way? Oh, simply, it was moved the meeting should come to a close, and carried.

Did you hear Mr. Fauquier say any thing or see him do anything? Not after that in the meeting.

[Here there are some questions and answers which it is unnecessary to set forth.]

You say he invited you and all the rest to go and take a glass of beer? Yes.

How long was that after the meeting was brought to a close? Immediately after."

It appears that both the witness and Barton were opposed to Fauquier. In reply to a question from Furguson, J., the witness states: "Yes, your Lordship, there were two other gentlemen treated after that. The witness in reply to a question of Mr. Bethune: Is Commanda a thickly or thinly settled place? It is only a thinly settled place; I should say that right in the neighbourhood of Commanda there will be a little over twenty-five inhabitants; I was counting them up as well as I could before I came down here."

Thomas Carr, Jr.—this witness was at the meeting." Who spoke at the meeting? Mr. Fauquier spoke first, and my father he had something to say.

After that what occurred ? Well, he talked a while ; at last the meeting was brought to a close.

In what way ? Well, in the legal way.

I don't know there is any legal way to close a meeting.

Tell me how the meeting was brought to a close ? Mr. Boyle said if there was no more to say he would close the meeting. I believe he announced to close, and we all got up to go out."

Milton Carr.—He was at the meeting.

"At the close of the meeting, what did you see or hear done by Mr. Fauquier ? Well, they were arguing pretty hot about this election, and Mr. Boyle said, why if there was nobody else to speak they would close the meeting.

Well, what next happened ? Well, they all started, and Mr. Fauquier said if we cannot agree upon politics, we will go and have a drink together ; we then went into the bar and there was a few out there and he invited all hands up.

Did you see anything more ? I saw him lay the money down for it, but what it was I cannot say.

Did you treat yourself ? Yes, sir."

Mr. Bethune then stated, that is all the evidence on that charge I have. And it is on this evidence and this evidence alone Mr. Fauquier has been disqualified. I have already set out the section bearing on this question, and two things appear to me to be clear, first: That no candidate shall furnish entertainment or drink to any meeting *while they are assembled* for the purpose of promoting an election, and that no other person, whether representing the candidate or not shall do so under a penalty in either case of \$100.

The first question then is, was the refreshment furnished to a meeting while they were assembled for the purpose of promoting the election ? In my opinion it was not. The meeting was over, it had been brought to a close and all the men assembled in number 15 or 16 had got up. Some had left the room and gone to the bar-room across the

passage, and some were still in the room, but the meeting was to all intents and purposes at an end. The learned counsel in his examination of the witness Thomas Carr, Jr. says: "I don't know there is any legal way to close a meeting," and I must confess I share in the ignorance of the witness if he is mistaken when he states in reply: "Mr. Boyle said if there was no more to say, he would close, the meeting. I believe he announced to close, and we all got up to go out." I have already shown that any person who shall furnish entertainment to such meeting, is liable to be severely punished whether he is acting on behalf of a candidate or not, and in this particular case we find that one of the witnesses himself treated in the same way as Mr. Fauquier; and that another did so, whose name is not mentioned. These men, therefore, violated the law if the meeting was assembled, and they did not, if the meeting was at an end. They had no personal interest in the election, they were opposed to Mr. Fauquier, and as they must, in the absence of all evidence to the contrary, be held to have known it was illegal to treat a meeting; surely the inference is, that the meeting was over. It was, however urged by the learned counsel for the defendant, that it cannot be said the meeting was not still in existence, because all that took place was, that some of the men merely left the room and crossed into the bar, but we must consider what were the facts. The meeting was held in a very small settlement, and no doubt the hotel where the meeting had been held, was very small. There was a dining-room in which the meeting was held on one side of the passage, and the bar-room on the other, and when the chairman announced that the meeting was closed, there was no other place to which the men could go before starting for their respective homes.

If an action was brought against Milton Carr to recover the penalty of \$100, is there any jury who would find a verdict against him, if the question submitted to them was, whether the meeting was closed, (in this case the Court are discharging the functions of a jury) when every

one of the witnesses examined, not only swear that it was closed, but show by their actions they believed it was by themselves calling for refreshment? I am satisfied they would not. It is, however, argued that the Election Court has in other cases decided what is and what is not a treating at a meeting, and that in consequence of such decisions we must hold this meeting was "a meeting assembled for the promotion of the election," and that it was not closed.

It is quite true no person present on this occasion had probably ever heard of the names of such cases, and were guided by what they believed was the intention of the legislature as shewn in the Act of Parliament, but they were mistaken, and consequently this gentleman is to be disqualified for eight years.

In my opinion the meeting was closed, and that there was no breach of the law, and this appeal should be allowed.

In this view, it appears I am mistaken, but I do hope the Legislature will see fit to relieve Mr. Fauquier from personal disqualification for an offence arising from a misconception of an Act of Parliament, against the provisions of which he had no intention to offend.

There was a second ground of appeal under the provisions of the 162nd section, which enacts "If it appears to the Court or the Judges trying an election petition that an act constituting in law a corrupt practice was committed by a candidate or with his knowledge and consent, but without any corrupt intent, and in an ignorance which was involuntary and excusable, and that the evidence showed the candidate to have honestly *desired* and in good faith endeavoured as far as he could to have the election conducted according to law, the candidate shall not be subject to the penalties and disabilities which he would but for this section incur, under the next preceding section." The learned Judge has summed up the evidence as follows, and I am satisfied to accept his findings so far as the facts are concerned:

"I may sum up or recapitulate the results of our consideration. We find that the act of the respondent in furnishing drink at his expense to a meeting of electors at Commanda Creek for the purpose of promoting the election, which constitutes in law a corrupt practice while it appears to have been committed in ignorance that it was a violation of the statute, does not appear to have been committed in an ignorance which was involuntary and excusable."

"We are disposed to believe that the respondent was desirous, and that he *endeavoured* to avoid personally committing illegal or corrupt practices, and even to avoid actual knowledge of their commission by others acting in his support; but we are not satisfied that he was ignorant that such practices were likely to be committed by persons acting on his behalf in the conduct of the election; and finding that corrupt practices did prevail, and there is reason to believe did extensively prevail at the election, and amongst those who supported the respondent, we are unable to say that the evidence shows the respondent to have honestly desired and in good faith endeavoured as far as he could to have the election conducted according to law."

I have already stated that in my opinion the act referred to was not a corrupt practice, but assuming that it was, then with all respect to the learned Judges who tried this case, I am at a loss to understand the reference to the 162nd section. The learned Judges having found that the appellant did commit the act in ignorance, "but that such violation of the statute does not appear to have been involuntary and excusable," he was not within its provisions because the exemption applies only where "the ignorance was involuntary and excusable." As I have already stated, this Court is now sitting to review not only the law, but the facts, and as regards the present question, it is expressly enacted that "that the Court or the Judges" trying an election petition shall form an opinion on the present question, and I can see no reason

whatever for saying that the ignorance of the appellant was not voluntary and excusable when we find that all the persons who were examined as witnesses who were present at the meeting, not only believed they were not doing any thing wrong, but acted on such belief ; and then adopting the finding of the learned Judges as to the actual conduct of the appellant, I think he is justly entitled to claim the benefit of the statute.

A. H. F. L.

EAST MIDDLESEX

PROVINCIAL ELECTION.

BEFORE BOYD, C., AND CAMERON, J.

LONDON, *November 14, 15, and 16, 1883.*TORONTO, *November 20, 1883.*

BEFORE THE COURT OF APPEAL.

PRESENT :—HAGARTY, C. J. O., BURTON, J. A., PATTERSON, J. A., AND
OSLER, J. A.TORONTO, *October 4th, 1884.*
*November 11, 1884.*THOMAS ROSSAL RHODER, *Petitioner*, v. DONALD
MCKENZIE, *Respondent*.*Bribery—Treating committees—Corrupt practices—R. S. O. ch. 10, sec. 151
—Evidence—Particulars of treating—Personal expenses—Treating—
Saving clause, R. S. O. ch. 10, sec. 159.*

- D., an agent of respondent, bribed M., a voter, by payment of money.
The same D. gave one L., after he had voted, \$1, which both D. and L. said was a loan and not a gift :
- Held*, as to the first payment, *per* BOYD, C., and CAMERON, C. J., a corrupt practice ; as to the latter payment, *per* BOYD, C., not a corrupt practice, the evidence not connecting the payment with the vote given ; *per* CAMERON, J., that it did.
- H., a voter, was paid \$4 by an agent of respondent for one day's work posting bills :
- Held*, *per* BOYD, C., not a corrupt practice ; *per* CAMERON, C. J., an unreasonably large payment for the work done, though not sufficient, if it were the only charge, to avoid the election.
- Two cases of personation were established, but no agent of respondent was a party to either.
- On different occasions a few members of one of respondent's local committees met together at different taverns, to go over voters' lists and arrange as to doubtful votes, and on each occasion liquor was furnished to the committee men thus engaged, at the expense of different agents of respondent :

Held, per BOYD, C., that such committee meetings were not "meetings of electors" within the meaning of sec. 151 of the Act; *per* CAMERON, C. J., that sec. 151 was specially directed against the treating of such committee meetings.

On appeal :

Held, by the Court, PATTERSON, J. A., dissenting, that such meeting were within the meaning of the section.

Held, at the trial, per BOYD, C., and CAMERON, C. J., that particulars and evidence, shewing the furnishing of liquor to such meetings of committees, were admissible under the general allegation of the petition, that respondent by himself and his agents had been guilty of "treating."

Held, per BOYD, C., that but one corrupt practice was proved, and that in view of the provisions of sec. 159 of the Act that one was not sufficient to avoid the return.

Held, also, per BOYD, C., that inasmuch as respondent's personal expenses had not amounted to \$100, and as, during the canvass, although he had treated friends, he had not done so to any greater extent than had previously been his habit, neither his personal conduct during the election, nor the absence from the trial of one of his chief agents, against whom considerable suspicion was raised by the evidence, ought to prevent the court from applying the provisions of sec. 159 to the circumstances of this case.

Held, per CAMERON, C. J., that though nothing corrupt or unusual was proved as to respondent's expenses or treating, he had not properly returned his personal expenses, and this circumstance, coupled with the keeping out of the way at the time of the trial of one of his chief agents, should prevent respondent receiving the benefit of section 159 of the Act, and the election should be avoided.

On appeal :

Held, OSLER, J. A., dissenting, that upon the evidence the election was saved under the provisions of sec. 159.

—THE petition contained the usual charges of corrupt practices, and prayed to have the election avoided,

McCarthy, Q.C., and Taylor, for the petitioner.

S. H. Blake, Q.C., and Aylesworth, for the respondent.

The facts are stated in the judgments of the learned Judges who tried the case.

BOYD, C.—There is one corrupt practice affecting the respondent through an agent which is, in my opinion, satisfactorily proved, namely, that Depotie gave \$1 to Willis Moxley for the purpose of bribery. Moxley says it was a charitable donation such as he had often received from Depotie and his family, though never before so much at one time. Depotie, however, says that he never gave Moxley anything in charity, but had lent him small sums

at various times, which were repaid, and that this was a loan of the same character. But the demeanour of the witnesses and the circumstances attending the transaction, are such as to point clearly to the conclusion that the money was given to induce Moxley to vote as Depotie wished. Depotie and Powers repair to Moxley's house about eleven at night, on the eve of polling day, rouse Moxley out of bed, and in the dark the money is passed into his hand while they arrange to come after him to vote the first thing in the morning. This is one of the examples of spurious philanthropy which is thus graphically referred to by Bowen, J., in the *Wigan Case*, 4 O'M. & H. 14. "The feeling which distributes relief to the poor at election times is too often not charity, but party feeling, following in the steps of charity, wearing the dress of echarity, and mimicking her gait." I think that the agency of Depotie is also sufficiently established. The respondent relied on the exertions of local organizations working through committees, to secure his return. Depotie and Powers were much together, and were together engaged in this Moxley transaction. We find Powers attending three meetings of such committees, one of which lasted two hours. One of them he attended upon getting a notice to attend; at another he is furnished with a voters' list. So we find Depotie attending a committee meeting at Daly's, which lasted an hour, at which the voters' lists were discussed and arrangements made as to the uncertain votes. Indeed, Daly says that Depotie was a member of the committee. Both Powers and Depotie attend a meeting at the Odd Fellows' Hall the night before the polling, at which Jarvis, a recognized agent of the respondent, was also present. A private conference took place between Jarvis and Depotie, at which the former lent the latter \$5, and after which Depotie took up Moxley, as already mentioned. Both these men were engaged all the next day with one of the vehicles which Lawson volunteered to lend for the occasion to the committee, in driving voters to the polls in the respondent's interest. There is here such a

cumulation of circumstances as justifies the finding that Depotie was, within the meaning of the election law, an agent of the respondent.

But, with this single exception, there is no other corrupt practice proved which affects the respondent, and I find in this strong confirmation of his own evidence that he tried to carry on the contest fairly, and told his agents to do the same.

I may now shortly state the grounds on which I proceed in exculpating him from all the other charges.

The payment of \$4 to the bill-poster Hurley is open to comment, as being a very large sum for the services rendered, and because it was not properly inserted in the account of Macdonald, the financial agent of the respondent. Yet, having regard to the undisputed evidence that Hurley promised to vote for the respondent when he first heard he was a candidate: that this payment had nothing to do with his vote: that the day on which he did the work was cold and stormy: that he got wet through, and caught a cold in consequence; and that both swear it was, in their opinion, not an extravagant price, considering the work and the weather,—I do not see my way to stigmatize the affair as a piece of corruption and bribery. Viewing it as an isolated case, I give the parties the benefit of the doubt, as was done by Hagarty, C. J., in a very similar transaction in the *Glengarry Case*, H. E. C., p. 19. I refer also to the *West Toronto Case*, H. E. C., pp. 98, 114, 123, 124, and the *Westminster Case*, 1 O'M. & H., 89, therein cited.

Again, the charge of corrupt treating on the part of Hurley by means of \$1 given to him for that purpose by Macdonald is a matter trivial and easily explained without any imputation of illegality. As put by Hurley, there were a lot of young fellows who had no votes, in a bar-room, assembled there after one of the election meetings. They chaffed Hurley, and asked him to treat; upon this Macdonald gave him a dollar, which he forthwith applied to satisfy this demand. It would be a burlesque upon the law to set aside the election on this ground.

As to the charge of Samuel Moore being bribed by Emigh, I prefer to take the version of the affair which Emigh gives to that of Moore. I watched the demeanour of Emigh both in giving evidence and during the trial, while evidence affecting him was given, and I consider him a credible witness. He is a person of some substance—an apparently respectable, well-to-do man, who could hardly be expected to perjure himself respecting a glass of beer and fifty cents. Arthur Jeffrey, who was called to contradict Emigh on some points, did not favourably impress me. Commencing with conjecture as to the liquor consumed and the number of treats, he gradually worked himself up to absolute certainty on these points, which could not have particularly concerned him. I hold that the treat he gave (Emigh gave Moore) was not to influence his vote, nor was the loan of fifty cents for which he was asked by Moore, who is described as a sort of “dead beat.” But apart from this I do not think that the agency of Emigh is made out. His name appears in a book produced by the Secretary of the Reform Association as forming one of an association to advance Reform principles; but it is not shewn that that had anything to do with the election. He attended one committee meeting just as it was being dismissed and after all the business was done. The respondent was not at this meeting and had but a slight acquaintance with Emigh, and never asked his aid nor knew that he was working. He did but very little, if anything, except on polling day, when he strolled about and chatted to people who were coming to the poll. He had no work assigned to him to do, and it would be going counter to many cases to fix upon the respondent any responsibility for his acts. I refer to the *North York Case*, H. E. C., 70; *Welland Case*, ib. 192; *London Case*, ib. 215; *East Peterboro Case*, ib. 245; *North Grey Case*, ib. 366; *South Ontario Case*, ib. 430, and *South Norfolk*, ib. 660.

There is not sufficient evidence to establish the charge of Littleton having been bribed by Depotie. He asked for the loan of \$1 from Depotie after he had voted, and it

was given him, but the evidence does not connect it with the vote previously given, and something more than the mere lending must be shown when the voting is over.

The charge of personation by Nathan Dale is established, but there is no evidence which would warrant his being called an agent of the respondent. He bustled about one of the polling-booths, but his conduct was not necessarily more than mere officiousness. I refer to the cases already cited as to Emigh.

The charge of personation of Keenan is also made out, having regard to the interpretation which is put upon the words "assumes to vote" in sec. 156 by a reference to sec. 198, R. S. O., cap. 10. The latter section declares that any person who applies for a ballot paper shall be deemed to tender his vote, or to offer or "assume to vote." See also *Reg. v. Hague*, 4 B. & S. 715. But upon the evidence I do not find that Macdonald connived at this personation or that the respondent is affected by it.

The treating of Donahay by Mr. Bartram is about as innocuous as any consumption of spirituous liquor can be. Mr. Bartram had been a successful candidate in the municipal contest and he treated because he thought he owed Donahay a drink on account of his election.

There appears to have been drinking both inside and outside the polling booth where Mr. Robert Taylor was Deputy Returning Officer. But all the officials there, engaged on both sides, participated in this consumption of liquor. The person sent for it was Samuel Moore, who also got some of it, but it is out of the question to say that this is a corrupt practice affecting the respondent. It was, in fact, a combination treat joined in by the officials on both sides at that poll, and was not a breach of the election law, according to the *North Ontario Case*, H. E. C. 785, 793, and *North York Case*, H. E. C. 62, 69.

It was argued that Hurley hired a team from Hiscox for use on polling day, and that this infringed sec. 154. This is not a charge in the particulars, and I think should not be added, as we have been almost unprecedentedly indul-

gent in allowing additional particulars, some on the first day of the trial, and many more on the second day. There is, besides, not enough evidence to say that this was against the statute. No hiring is proved, and the team may have been used to convey persons other than voters, *e. g.* committee men and canvassers. See *West Toronto Case*, H. E. C. 98, 120.

I am not prepared to hold that the treating by Williamson on polling day was illegal and corrupt, as he said it was his general rule to treat when he had the liquor, and it had nothing to do with the election. Other Judges have excused such things, especially when the election day was as here, very cold. See *North York*, H. E. C. 62, and *South Norfolk*, H. E. C. 669, and the recent *Lennox Case*.

Next comes to be considered the alleged treating of meetings of electors under sec. 151 by the tavern-keepers Depotie, Daly, and Woods. But it is objected by the respondent that these particulars are not admissible under the allegations of the petition, and that there is no jurisdiction now to amend the proceedings by evidencing the charges. The petition is in the usual general form sanctioned by the practice and the Rules of Court Nos. 2 and 6; *Beal v. Smith*, L. R. 4 C. P., 145, and *South Oxford Case*, H. E. C., 240. The fourth paragraph of the petition is in my opinion comprehensive enough to cover these charges. The term "treating" therein used is a generic word which may properly embrace all kinds of entertainment from the most harmless to the most baneful. The context shews that it is used in a sense indicating that the candidate and his agents had acted illegally in treating. Under this allegation, considered merely as a pleading, it is competent to give particulars and evidence of any acts of treating which would incapacitate the respondent and avoid his election. In *Grant v. Pagham*, 3 C. P. D., 80, the Judges deal with the words "treat or treating" and entertainment of "meat and drink" as synonymous expressions. Although sec. 151 was originally placed, with other provisions, under the general heading "keeping the peace and

good order at elections," it is now found in the Revised Statutes, otherwise grouped with sections which relate to treating, and under the general heading "Prevention and punishment of corrupt practices and other illegal acts at elections." From this I infer that the Legislature regarded sec. 151 as one which savoured of treating, not in its strictly corrupt sense, but in a manner to be prohibited because of its tendency to induce corruption and disorder. To adapt to this matter the language of Cockburn, C. J., in an analogous case, *Hargreaves v. Simpson*, 4 Q. B. D., 405, the whole scope, and I may add collocation, of the sections seems to be to deal with it as a form of treating—as a milder and less noxious form of treating—but still an offence coming under the same head. That decision also applies here, as it was there held by the Court that the giving of refreshments to voters at a municipal election on account of their having voted was technically and substantially "treating," though not so denominated or defined in the statutes making the practice illegal. It is not necessary to make any further observation on the recent *West Simcoe Case* (a) than to say it does not apply here. In that case the petition set forth that the respondent and his agents were "guilty of corrupt practices as defined by the Controverted Elections Act." The Judges, under this language, felt compelled to resort to the Act to ascertain what were the corrupt practices complained of, and they held that the Act did not include thereunder the giving of refreshments on polling-day as prohibited by section 153. Here the pleader does not fetter himself by any reference to the statute, and we can give to the word "treating" its proper and obvious signification.

Having thus overcome the difficulty of form, it remains to consider whether the treating in evidence is contrary to the law. The first treat was given at a meeting held at Daly's tavern, where about ten of the local committee were met to go over the voters' lists and arrange as to doubtful votes. Depotie, another tavern-keeper, attended, and in that capacity, to encourage trade, ordered liquor for those

thus engaged. The next meeting was at Depotie's, at which but few attended. Daly was present on the committee and reciprocated Depotie's efforts to keep the trade brisk, and so did Woods, another tavern-keeper. Depotie also treated *pour encourager les autres*. The same scene was repeated at the third meeting of the committee which was held at Woods's tavern, and about the same persons were present and for the same purpose. The great preponderance of authorities forbids the conclusion, that any of these committee meetings was a "meeting of electors" within the purview of sect. 151. In the *South Grey Case*, H. E. C. 57, 61, the distinction is plainly marked between meetings of electors to promote the election and meetings of committees, and as to the latter, Mowat, V. C., says: "I do not think that reasonable refreshments furnished *bonâ fide* to meetings of committees are illegal." Of the same opinion was Richards, C. J., in the *West Toronto Case*, H. E. C. 106. There is also an explicit decision of Draper, C. J. A., after the original of the section was amended as it now stands in the Revised Statutes, in *North Victoria Case*, H. E. C. pp. 257, 259, and 260. After an election meeting some of the candidates' friends adjourned to a hotel and remained consulting about the election (*i. e.* practically a committee meeting), and it was decided that it would be an extreme construction to hold the entertainment of such a meeting to be a violation of the section in question. And again the same learned Chief Justice, in the *Halton Case* H. E. C. 285, said "a meeting of a committee to aid in the respondent's return, at which refreshments were provided, could not, unless in some extreme case, be deemed a breach of the provisions against treating." A somewhat contrary view to this is taken for granted by Gwynne, J., in the *North Grey Case*, H. E. C. pp. 363 and 364, but that may be fairly considered as neutralized by his manner of referring to such a meeting in the *Welland Case*, H. E. C. p. 190. The object of the treating we are considering was manifestly not with a view of promoting the election, but of promoting the interests of the publicans, and the com-

mittee meetings there assembled were not "meetings of electors" as understood in election law.

I have now exhausted the list of direct charges which Mr. McCarthy argued vitiated the election, and I find but one proved. That one, however, would avoid the return if it is not saved by section 159. Against this two lines of argument were advanced: *First*, that the candidate's own admissions shewed him to be guilty of undue and corrupt treating, and *second*, that owing to the withdrawal or concealment of Jarvis, a chief agent, every presumption should be made against the legality of the matters with which he was connected.

There is, in my opinion, no foundation for the first imputation. The personal expenses of the candidate were \$99. It was suggested that at least half of this went in treating, but he says his canvass lasted some forty days; that his expenses (for self and horse) per day would average about two dollars, and that perhaps \$5 of the \$99 went in railway fares. Ordinarily he was given to treat the people he met with to the extent of between 25 and 50 cents a day. I believe him when he says (and none the less because he is corroborated by Mr. Martin, a Conservative witness who knew his habits) that he did not engage in as much treating during the canvass as before it, and that in regard to the manner of his treating there was no difference; that is to say, to use his own words, "I treated my friends, whether Reform or Conservative, in the same way as before I was a candidate." No direct charge of illegal treating is formulated against the respondent, and following the *North Middlesex Case*, H. E. C. 377, I reject this treating as any element which should affect the consideration of section 159.

As to the absence of Jarvis, it would be more satisfactory to have had his evidence, but I do not see that the respondent is to be punished or the constituency affected because of his disappearance, in the circumstances of the case. Jarvis is charged with bribery, but it is not proved against him. There is no evidence to counter-balance De-

potie's oath that the \$5 he obtained from Jarvis was a loan, which he has repaid. Whatever may be suspicious in this transaction, it cannot be said that guilt is either proved or to be inferred. What other matters with which Jarvis was connected can be considered as affecting the election? These, that he started a subscription to defray the election expenses of the respondent, and that there were sums upon the list amounting to between \$30 and \$60; from Jarvis, the respondent's financial agent Macdonald obtained "in the neighbourhood of \$35." Now it seems impossible to link together a number of assumptions and conclude, as was argued, that it is to be inferred that sufficient money was expended through Jarvis as might be reasonably supposed "to affect the result." We do not know that any more was subscribed—we do not know that any more was collected than was handed over to Macdonald, and we do not know of anything expended save as appeared in the evidence at the trial.

The presumption is always in favour of honesty and legality and fair dealing. The absence of Jarvis, if wilful (as it appears to be) would cast doubt upon his conduct, but it would be unjustifiable to carry the presumption to such a length as to set aside the election and vacate the seat. This is not a case of ordinary litigation in which the failure to call an important witness may turn the scale against the party who might be expected to call him. The charge against Jarvis is one of bribery, and it is the business of the petitioner to make that out. If he had given evidence to show that more money was in the hands of Jarvis than was paid to Macdonald, and that such money was expended for election purposes, otherwise than through the financial agent, then the *onus* might, and I think would, rest on the respondent to shew that the disbursements were for legitimate purposes. But nothing of this kind appears, or can in my judgment be reasonably inferred from what we have seen and heard, in this most pertinaciously contested trial. That class of evidence, noteworthy by its absence here, was adduced and formed the reason of the deci-

sion and language of the judges in the cases cited to us : See also *The South Grey Case*, H. E. C., 61, and *West Toronto Case*, H. E. C., 105; *The Bradford Case*, 1 O'M & H., 30. See also *North Victoria Case*, H. E. C., 265, where an important witness was not procurable, and the *North Ontario Case*, H. E. C., 342, and the *Kingston Case*, H. E. C., 641.

So far as the financial agent was concerned, I think the fair result of his evidence is that he properly and lawfully expended all the money that came into his hands, amounting to the very inconsiderable sum of \$20, from the treasurer of the Reform Association of East Middlesex (part of which was paid for the outlay in calling the convention), and the further sum of about \$35 from Mr. Jarvis, in all, as he says, between \$50 and \$60. There were in all 5,319 votes polled, and the respondent's majority was 85. The Judges in these trials are to regard not only the rights of the parties, but also the rights of the electors of the constituencies and of the public. That is pointedly adverted to by Mr. Justice Grove, in *Aldridge v. Hurst*, 1 C. P. D., 414, where he says: "The right of petitioning shews that the act contemplates not merely the rights of candidates, but the rights of the constituency, to insure that the person really elected should be their member; and this without the cost and disturbance of a new election." These observations having primary reference to the claim of the seat for the opposing candidate are not without their application to sec. 159 of the Ontario Act. Adhering to the construction of this section, which I endeavoured to explain in the *East Simcoe Case*, (a) my conclusion is that in this constituency another election is unnecessary and useless, because no such acts of corruption or illegality were committed by or on behalf of the respondent as could possibly affect the result. It would be unjustifiable to expose the constituency to the expense and trouble of a new election, and the petition should be dismissed.

It is a case for apportioning costs, and in my view the petitioner should get costs of so much only of the petition and trial as he has succeeded upon.

CAMERON, J.—I am of opinion the election of the respondent should be set aside on account of bribery and other corrupt practices, committed by his agents. The payment of \$1 by Joseph A. Depotie, an agent of the respondent, to Willis Moxley for his vote, was clearly made out. I think it was also established, though not with the same degree of certainty, that the said Depotie was guilty of a corrupt practice in giving to Thomas Littleton \$1 after he had voted, on account of his having voted, and by reason of a previous corrupt understanding between them. This man, Depotie, after seeing Mr. Jarvis, one of the principal supporters and agents of the respondent, and receiving \$5 from him at the hall, where there was a meeting of the supporters of the respondent, went late at night to see these two voters, Moxley and Littleton. There is no reasonable solution of his going there except for the purpose of securing their votes, and by the means that were used. The very manner in which the money was placed by Depotie in Littleton's pocket, though Littleton attempts to explain the act by saying his hands were dirty, is a strong circumstance to show that the money was not intended by either party to the transaction as a loan. It was a device to enable the receiver to say that he had not been paid or lent the money on account of having voted and it may be if Power had not proved unfaithful to the confidence placed in him, the truth might not have been elicited through that ease of conscience, or ignorance, which induces the uncandid to satisfy themselves that if the question does not directly indicate the exact transaction, it may be answered without committing perjury. Power knew more than he would tell, and his manner stamped him as an untruthful witness. In anger he divulged what had taken place, and this becoming known, the parties admitted that they felt they could not, without danger, unequivocally deny, and seek to cover the transaction as far as circumstances will warrant with any show of reason. I have no doubt in my own mind the corrupt practice in respect of Littleton was made out. The payment of \$4 by

Alex. J. Macdonald, the financial agent of the respondent, to Jeremiah Hurley for posting fifty bills, was an unreasonable remuneration for the service rendered, granted that such service was rendered on a very inclement day and was worth more on that account than it otherwise would have been. I regard this but as a pretext. The fact that in the account rendered by Mr. Macdonald of his expenditure as the financial agent, no reference is made to this payment to Hurley, is in itself suspicious, and the suspicion is not lessened by the further fact proved, that Hurley was driving a vehicle obtained at Hiscox's livery stable, in London, where he was sent for it, according to him, by Mr. Macdonald, for which he was paid nothing. The payment for driving might be objectionable, as hiring a person to drive a team might be held to be paying for the conveying voters to the poll. The man who accepts twice as much as a job is worth is not the most likely kind of person to work for nothing, unstimulated thereto by the previous knowledge that he had been paid too much for something else. This Hurley also received money from Mr. Macdonald to "treat the boys," of which expenditure no account is taken in the financial agent's return of his expenditure. If the upholding or avoiding of the election depended upon this payment, I should be obliged to give the benefit of the doubt in favour of the respondent. As a matter of belief, however, I am satisfied the payment of the \$4 was not made solely on account of the character of the day on which the work was done, and that had an election contest not been going on the service would not have been so liberally rewarded. I am of opinion in the treating of Samuel Moore, and the lending or giving him 50 cents or \$1, whichever was the sum, by Henry Emigh, were acts done by Emigh with a view of influencing Moore to vote for the respondent. I think Moore's account, corroborated as it is in part by Arthur Jeffrey, is more to be relied on, under the circumstances, than Emigh's. The evidence on behalf of the respondent in regard to Moore is to make him out a loose fish, and under the circumstances, it is a little singular

according to Emigh's own account of the transaction that they should have gone together to Jeffrey's and taken a drink, and on the way back he should have given or lent him the money. He admits that he asked Moore how he was going to vote, and Moore said he didn't know. This answer indicated he might be cultivated with profit. While I rely on Moore's account of what passed between him and Emigh, more than I do upon Emigh's, the difficulty is holding the respondent should be affected by his act, not by reason of Emigh not being his agent, which I think, as a member of the association, he was, but by reason of Moore's own statement that he didn't ask him to vote for the respondent, or not to vote; and, as in the Hurley case, if the election was to be set aside on that case alone, I would give the respondent the benefit of all the doubt there is presented by this statement of Moore's, that he was not asked to vote or not to vote.

I think the treating at Daly's, Woods's, and Depotie's taverns, of committees formed to promote, and there assembled for that purpose, the election of the respondent, was made out according to both the evidence of James Daly and Depotie himself. Depotie treated, and so did Woods. The going into these charges was objected to as not covered by the petition. I think the objection is not entitled to prevail. The petition charges that treating took place contrary to the Act, and I do not think it can be said it is necessary to specify in the petition the particular kind of treating to let in evidence, where the particulars warrant it, of any kind of treating that is made a corrupt practice by the Act. I am of opinion section 151 was specially directed against the treating of committees composed of electors. It declares, "No candidate shall, nor shall any other person, either provide or furnish drink, or other entertainment, at the expense of such candidate or other person, to any meeting of electors assembled for the purpose of promoting such election, previous to or during the election." A committee composed of electors, wholly or in part, whose object in assembling is to take measures

to secure the return of the candidate they support, certainly comes within the terms, "meeting of electors assembled for the purpose of promoting the election." Who are to be taken as the actors in the object to promote the election under this language? The person, if there be one, calling the meeting, or those assembled? A general meeting of the electors called to hear the speeches or addresses of the candidates, can hardly be deemed assembled to promote the election, as far as those assembled are concerned. They come to hear, not to act; while in the case of the committee it is assembled to act in the promotion of the election; and when the latter part of the clause is considered it appears to me the latter kind of meeting is indicated very clearly. It excepts from the operation of the prohibition in the first part any entertainment furnished by the candidate, or other person, to any such meeting of electors at his, her, or their usual place of residence. It is most improbable that any general meeting of electors will be assembled at the private residence of any candidate or agent. What the Legislature was aiming at was the prevention of persons being induced to act and assist the candidates by drink, or other entertainment, being furnished to them at hotels or other places of meeting, not being the residence of the person providing it. There is no decision that can be said to have settled the question now presented, and the language of section 61 of chap. 21, 32 Vic. (O.) is so different that the change itself strongly leads to the conclusion that the construction I have placed upon the present section is the one intended it should bear. Section 61 of the Act of 1868 enacted: "No candidate or other person shall, *with intent to promote the election*, furnish entertainment to any meeting of the electors assembled for the purpose of promoting the election." It would seem absurd to say that when the friends of a candidate assembled for the express purpose of promoting his election, and the candidate or some one for him furnished entertainment, he did it with intent to promote the election, and unless the meeting was one of mixed character such intent could hard-

ly be held to exist. Under the Act of 1868, in the *South Grey Case*, Mowat, V. C., said, H. E. C., page 57: "I do not think reasonable refreshments furnished *bona fide* to committees are illegal." To the like effect is the opinion of Chief Justice Richards in the *West Toronto Case*—H. E. C., page 106. In the *North Grey Case*, Gwynne, J., held that members of the Conservative Association assembled at a tavern were electors assembled to promote the election of the candidate of the association, under the said section 61, after it had been amended by the Act of 1873, when it assumed its present shape. The same learned Judge, in the *West Wellington Case*, H. E. C., 234, held treating a general meeting of the electors a corrupt act. In the *Halton Case*, H. E. C., 285, Draper, C. J. A., expressed the opinion, "that a meeting of electors all one way of thinking to support a particular candidate, or of a committee to aid in his return, at which refreshments were provided at the expense of one or more of them, could not, unless in some extreme case, be deemed a breach of the provisions against treating." The facts in reference to which this opinion was expressed do not appear, and I am unable to say whether it was a mere *obiter dictum* or not. The case went to the Court of Appeal, but the point was not there raised. It is well that the point should be settled, and it may as well be so settled in this case as any other. My learned brother, the Chancellor, does not take the same view that I do, and I presume the case will have to receive the consideration of the Court of Appeal.

It may be observed that treating a general meeting of the electors would come under the designation corrupt treating, owing to its extensive character; but why should the treating of a mixed meeting be more objectionable than treating a meeting all one way of thinking, if not corruptly done. The furtherance of the cause of temperance would not be greater in the one case than the other. Treating a general meeting might of course more readily cause a breach of the peace.

The case of the personation of Joseph Ling by Nathan Dale was established. But the agency of Dale does not appear to have been made out. The attempt of Keenan to personate Tierney was also established. I think whether he voted or not, he did sufficient to bring his act within section 156 : *Regina v. Hague*, 4 B. & S. 715. There was no evidence to shew that he was an agent of the respondent, or that any agent of the respondent was a party to his attempt. I do not think what took place at the poll sufficient to fix the respondent with responsibility. It does not appear that the respondent's agent, Macdonald, was aware of the attempt at imposition, assuming that he did say Keenan had a right to vote, as it does not appear that he knew he was not the person he claimed to be, that is, Tierney. I think the charge of treating on polling-day by Williamson or McNames cannot be said under the decisions to have been corrupt, though I have no moral doubt the liquor was provided to be used for the purpose of aiding them in inducing voters to go to the poll and to influence their votes. There are those who value the franchise so little that while they would hesitate and perhaps refuse directly to sell their vote, they would be influenced by the good fellowship supposed to be promoted by a bottle of whiskey to vote as its proprietor might wish.

The way the liquor was furnished indicates that there may have been a settled policy to use this subtle agency extensively, and while I do not find the charge, as made, proved, it has not been without its effect upon me in leading to the conclusion the election should be avoided. The hiring the livery-stable keeper Lawson's teams on polling day I think, having regard to what was sworn to, was not made out, but I have a very strong conviction that their use was in some way compensated for, and that the facts with reference to it were not drawn out. Of course it is possible, but quite improbable, that this young man Lawson, who was under age, was taking so much interest in the election as to bear so considerable a loss purely from party considerations. It is to be observed, too, that

there was no difficulty in procuring his evidence on behalf of the defence in respect of a matter that was not charged in the particulars, while the testimony of Mr. Jarvis was not procurable, though he took a prominent part in the contest. With reference to the charges of treating by the respondent personally, I think nothing corrupt or unusual was proved, but he certainly did not carry out the letter or spirit of the Act in the way in which he returned his personal expenses. The provision is exceedingly clear and specific, and was intended by the Legislature as an important safeguard against the expenditure of money by a candidate or his agent improperly in promoting his election. It is from want of observance by him of the requirement of the Statute in this respect, and the absence of Mr. Jarvis, and the failure to account for the money subscribed as the fund out of which the expenses of the election should be defrayed other than those personal to the respondent, that prevent my feeling justified in giving to him the benefit of section 159. With reference to the amount expended by the respondent personally, it certainly was not large, but spent at the rate of \$1 per vote, the price paid for Moxley's and Littleton's, it would go a long way. I cannot say the corrupt practices proved, taken in connection with other illegal acts and practices shown to have existed, were of such trifling nature or of such trifling extent as not to have affected the result. The majority certainly could not be converted into a minority by striking off the votes tainted with corruption. But almost every corrupt practice named in the Act was resorted to, and it is quite impossible to say that the evidence by any means laid them all bare. There was direct bribery, personation, double voting, treating meetings of committees, and other treating, to a very considerable extent, strong suspicion of the hiring of teams, and an absence of proper detailed accounts by the respondent of his own expenditure, and of the fund raised for the purpose of defraying the expenses of the election. Section 183 of the Act declares no payment except the personal expenses of the candidate, and no advance, loan

or deposit for the purpose of the election, shall be made by or on behalf of any candidate at an election before or during or after such election, otherwise than through an agent or agents whose name and address or, names and addresses, has or have been declared in writing to the returning officer on or before the day of nomination. By section 185 it is declared all persons who have any bills, charges, or claims upon any candidate for or in respect of any election, shall send the same, within one month from the day of the declaration of the election, to such agent or agents as aforesaid, otherwise such persons shall be debarred of their right to recover such claims, and every or any part thereof. By sub-section 4 of this clause the agent is not permitted to pay or allow any bill without the authority of the candidate and the agent's own approval.

By section 186 a detailed statement of all election expenses incurred by or on behalf of the candidate, including payments in respect of his personal expenses, shall within two months after the election be made out and signed by the agent, or, if more than one, by every agent who has paid the same, including the candidate, in case of payments made by him, and delivered with the bills and vouchers relative thereto to the returning officer. And the returning officer is required within fourteen days to cause to be inserted an abstract of such statement, with the signature of the agent thereto, in some newspaper published or circulating in the Electoral District. And an agent or candidate making default in the delivery of such statement shall incur a penalty not exceeding \$25 for every day during which he makes default. All this particularity, and the penalty imposed for non-delivery of the statement, show that the Legislature attached much importance to it; and where it has not been observed, and a corrupt practice, sufficient before the amendment of the law made by section 159 to avoid the election, has been proved, though under that section the election might not have been set aside, the election should be avoided. The respondent has in this case failed to make such a detailed statement. The

statement gives no information as to particular persons paid, or the amount to each person, and thus fails to show the character of the expenditure in respect of each payment. The important defect here is, there is no account whatever of the expenditure of the fund that was raised with the knowledge of the respondent to pay the election expenses other than his personal expenses, except in so far as that fund reached the hands of the financial agent. It was quite lawful that a fund should be raised to pay the election expenses, but unlawful that any part of the fund should be expended except through the financial agent or agents. And it appears to me it was the duty of the respondent to show how the money was applied. He has not only not done so, but the manager of the fund, a former secretary of the Reform Association, from the evidence appeared to be keeping out of the way to avoid being examined. The evidence also established that several persons subscribed to the fund, the amount whereof, from the absence of the person who could tell, is left in doubt, though it was shown to be considerably greater than the amount paid over to the financial agent. It also further appeared that Depotie got five dollars from the person who held the fund, and makes the pretext that it was borrowed, and the farce was gone through of its being repaid the day before the trial. Shortly after the receipt of the money its recipient, too, proceeded to Moxley and Littleton, who got a portion probably of this very money for the purpose of paying for their votes. It seems to me under the circumstances, coupled with the fact that a majority of 180 for the Conservative candidate against the respondent at the previous election was converted at this into a minority of 86, the election could not be allowed to stand, and in support of the view I have expressed as to the duty of the respondent in regard to the fund, I quote the following opinion of Baron Fitzgerald in the *Belfast Case*: 1 O'M. & H. 285: "I have no reason to believe that a subscription instituted for the purpose of paying the expenses of a candidate and to relieve him from any expense in the matter is

in anyway an illegal or unconstitutional proceeding. It would behove a candidate to look well that the money of which he availed himself of his own knowledge is legitimately applied, because he incurs a responsibility the moment he holds himself out to be elected by those means."

The Court is not in these trials restricted to the consideration of the interests of the petitioner and respondent: their duty requires its members to have regard for the object of the legislature in its efforts to secure purity of election and the public security involved therein. They should not permit the safeguards erected by the legislature to be thrown down and disregarded, and when the law prohibited any payment, advance, loan or deposit for the purpose of the election except through the financial agent of the candidate, the Court should rather strive to enforce the observance of the prohibition than to be astute to relieve a candidate in consideration of the fact that he had been personally free from actual or intentional wrongdoing. The petitioner should have the general costs of the petition and trial.

From these judgments there was an appeal to the Court of Appeal, which was heard on October 4th, 1884.

McCarthy, Q. C., for the appeal.

S. H. Blake, Q. C., contra.

November 11, 1884. HAGARTY, C. J. O.—Although not necessary, in the view I take, for the decision of this case, I think it right to give my opinion on the proper construction of section 151, as to furnishing drink or other entertainment "to any meeting of electors assembled for the

purpose of promoting such election previous to or during such election."

The learned Judges who tried this petition differed widely in their views. The Chancellor held that the section had no application to committee meetings. Chief Justice Cameron held that it did so apply.

It may be possible that the framers of this enactment may not have supposed that it applied to such meetings. Our duty is to construe the words used in their plain, obvious, grammatical sense.

If electors assembled by arrangement to promote the election of the candidate they wished to elect it is not easy to hold against the language used, whether they were called a committee, or met as committee-men, or under any other name, that they did not in fact compose or amount to a meeting described in the section.

It seems to me to be more a plain question of fact than of legal definition. Did they assemble by arrangement with that purpose in view? If so, it was a meeting pointed at by the section.

After the nomination of the candidate committees are generally formed, a general or central committee, with branches in different localities, the branch or local committees generally assuming the management of matters in their divisions, to examine the voters' list, to stimulate some, to canvass others, to arrange for the bringing up of voters to the polls, &c.

They arrange among themselves their places and times of meeting. Their numbers may be large or small. We know that in cities there is sometimes a large central committee and ward committees. They may vary in numbers from fifty to a dozen, or less.

In the case before us at some of the meetings only ten or twelve were present, at another twenty or thirty were assembled.

I do not see how I could hold that any such meetings were not clearly within the statute.

If they did not assemble to promote the election, I cannot see what motive brought them together.

The promotion of the election seems to be the sole reason of their existence.

It is not difficult to suggest an apparently startling result of a too rigid application of this construction.

It is asked cannot two or three voters meet together to go over the lists and make suggestions, &c.?

I can only answer that it will be time enough to pass judgment on such a case when it arises. I do not hold that any fortuitous meeting of two, three, or a dozen electors discussing the best means of advancing their candidates' interests, need fall within the words of the enactment. A number of voters, all of one party, might, without any prearrangement, meet in a tavern.

Such a gathering would not, I think, answer the description of "a meeting assembled to promote the election." Its coming together could not be foreseen or provided for. This Court held in the *Muskoka Case*, that when a candidate publicly announced that he would meet the electors at a named time and place, and they assembled accordingly, that such a meeting was within the statute.

I must hold that when a committee—general or local—consisting of voters, meets at an agreed time and place to arrange for the success of their candidate, I cannot pronounce it outside the Act.

Some of us remember the abuses of elections in past years, when committees for many days, if not weeks, before the day of polling, lived at the cost of the candidate.

I am not prepared to say that even under the much improved modern system of elections, serious abuses, and possibly serious means of undue influence and corruption, might not be used, if by law all committee meetings are declared to be free from the operation of this section.

I am therefore constrained to hold that the treating at these meetings, proved in evidence, was an illegal practice, and that, at least in one case, it was done by an agent of the respondent.

But, on full consideration of the matters in evidence, I am willing to allow that under the remedial or saving clause the election ought not to be set aside. On this head the law, as to the application of this section to meetings of electors, was not in a very certain shape under some of the decisions of learned Judges, and it may have been that the treating in this case was not within the prohibition.

As I have already stated in the *East Simcoe Case*, (a) I agree in the marked distinction which we should make between an agent entrusted by the candidate with the general management of the election, or one who, by superior energy or ability, is allowed to take the lead in such management, and the isolated actions of a person whom the law fastens on the candidate as one who must be regarded as his agent. In the latter case the illegal practice begins and, as it were, ends with the perpetrator.

I cannot bring this man Depotie into any position of general trust or management.

I agree in the argument that once a corrupt act is proved to have been committed by the candidate, or an agent, the election is in law avoided—that the burden of averting this consequence, under the relieving clause in this act, must mainly be thrown upon the respondent, so far as his own liability is concerned. We have of course also to consider the interests of the constituency as to expenses and uselessness of a new election.

The learned Judges agreed that one act of bribery was committed by Depotie in Moxley's case.

As to Littleton's case, I think we may allow the insufficiency of direct proof, but I think it right to designate the transaction as of a most dangerous and suspicious character on the part of an agent of a candidate.

As to Emigh's case, I think it fails solely and only because agency was not proved.

As to Hurley, the bill-poster, with the difference of opinion between the Judges, I do not, sitting in appeal, think I should pronounce against the more lenient view.

The other matters urged against the Respondent I do not propose to discuss, and I have come to the conclusion that, though some of them be open to unfavourable comment, they do not form grounds for setting aside the election.

On the whole, I think that the Respondent may be allowed the benefit of the relieving clause of the Act.

The bribery by Depotie, and his infringement of the law as to the meetings of electors. The election was carried by a majority over eighty. There is no personal imputation against the respondent beyond objections to the form in which he returned his expenses ; and the corrupt conduct of Depotie ought not, I think, under all the circumstances of the case, to deprive either the sitting member or the constituency of the relief allowed by the Act.

It may perhaps be found hereafter that the only way to stamp out the abomination of bribery is to render every election void in which it is committed by any agent. It may be, that when it is known that there is no pardon for it—no escape from the consequences, whether it be committed on a large or a small scale—there will be far greater probability of an honest, earnest, and successful effort being made by a candidate and his supporters to avoid the offence.

The Judges have often to regret the unpleasant duty cast upon them in these election trials. It is no small addition to the task of decision that they are now required to decide on the effect of this section—to draw a line defining the nature and extent of the proved violations of the law.

In this, as in other cases, we have the learned trial Judges forming diametrically opposite conclusions as to whether the acts proved should or should not be held to avoid the election.

Differences in judicial opinion, both as to fact and law, are of constant recurrence, but for obvious reasons, it seems most undesirable that they should occur in such a matter as the trial of an election petition. It is to be feared that in such a case they must detract seriously from the weight

and authority of legal decision. If so, the fault is, of course, in the system and not with the learned Judges, who must decide according to their respective convictions. All this, however, is for the consideration of the Legislature. By the Imperial Act of 1883 a very strong attempt is made to ensure purity of elections. There is a relieving clause, but not applicable to cases of bribing, where if the Election Court, consisting of two Judges, make a report exonerating the candidate and his election agent from sanctioning or connivance with the illegal practices, and that they took all reasonable precautions, &c., and that the offences reported were trivial, unimportant, and of limited character, &c., &c., the election shall not be avoided. This report must, of course, be with the sanction of both Judges, and that statute does not provide for the case of difference of opinion as to such a report.

In the *East Northumberland Case*, decided last January, this Court decided that the certifying of these findings and disagreement by the learned Judges is merely an interlocutory proceeding, and that after one decision on the matter certified, it rests with the trial Judges to proceed with the case to final decision.

BURTON, J. A.—I have but little to add in this case.

I agree with the Chancellor that only one act of bribery by agents was made out, and I agree with him also in the view that it would be a burlesque upon the law to set aside the election on the ground of Hurley expending a dollar in treating under the circumstances referred to in evidence.

The point I wish to refer to is, the charge of treating meetings under section 151. I see no reason to change the opinion which I expressed in the *Muskoka Case*, (a) that we ought to adhere to the ordinary rule of construction, and where we find words that are clear and unambiguous we are bound to interpret them according to their well-known and ordinary meaning.

(a) ante p. 197.

It is quite probable, nay, I think almost certain, that when this section was first passed, collocated as it was among those sections which were aimed at the preserving of peace and good order, it never was intended to apply to mere committee meetings, but the Legislature has since made any violation of it a corrupt practice. How is it possible for us to say, apart from the language used, to what extent they intended the prohibition to go? What we have really to consider is not what the Legislature meant but what its language means. To give that language a construction, contrary to or different from that which the words import, or can possibly import, is not to interpret law but to make it. I therefore am of opinion that when the Legislature excepts one particular class of meeting only, it would be most unsafe for any one to say that all others are not included.

But although I think that what occurred at these meetings were corrupt practices, I am very far from saying that the election should be avoided in consequence of those or any other corrupt or illegal practices proved at this election.

I shall satisfy myself with saying that I think the Chancellor's judgment sound, and that it should be affirmed.

PATTERSON, J. A.—There are three charges of bribery, respecting the proof of which the learned Judges disagree. They agree that Depotie bribed Moxley, but they disagree about Littleton, to whom, after he had voted, Depotie gave a dollar. The Chancellor thought the evidence insufficient to prove that the payment was corruptly made on account of Littleton having voted. The Chief Justice was of opinion that that was the proper inference from the facts in evidence, and I think I should have myself come to that conclusion. There was no dispute as to the fact of the payment; there was no reasonable explanation of the coincidence between the visit to Littleton the night before the polling and the so-called loan to him of the dollar the next day.

Depotie came within the definition of agent, as both the learned Judges agree.

Mr. Macdonald, the financial agent of the respondent, paid one Hurley \$4 for posting bills, which seems to have been more than would have in ordinary circumstances have been paid for that service, and he also gave him a dollar to treat some people in a bar-room after a meeting. These acts the Chief Justice held to be corrupt, the Chancellor taking a more lenient view of them.

If the two learned Judges had agreed that the charge was proved, I should not think of disturbing that finding in appeal. But when they do not so agree, we ought to have somewhat direct, or at least very convincing, evidence that the negative opinion is wrong. I do not think the evidence at all of that character. The incident of the dollar, on which the Chief Justice places stress, seems to me free from the significance which he attaches to it. Macdonald might have "treated the boys" himself, so far as I can perceive, without any imputation of illegality. I find nothing whatever in the evidence, beyond the bare fact of the payment of the \$4 for the job, to suggest a corrupt motive in paying it. Such evidence as we have about Hurley is to the effect that he had always belonged to the respondent's side of politics and attended the meetings of the Reform Association. No reason for bribing him is shewn, and to find as a fact that he was bribed would be to supplement the solitary fact of a payment, which is said to be more than the services were worth, but which is by the evidence explained by reference to the weather in which they were performed, by suspicions.

Another subject of disagreement, viz., the treating of Moore by Emigh, and the payment or loan of either 50 cts. or \$1 by Emigh to Moore, would be open to observations of the same kind, only there is really no plausible reason given why Emigh should have either taken Moore to the saloon in the adjoining Electoral Division and treated him, or why he should have given him money. The Chancellor says in his judgment, that he preferred the version of the

affair given by Emigh to that given by Moore, and the Chief Justice thinks Moore's account, corroborated as it is in part by Jeffrey, is more to be relied on, under the circumstances, than Emigh's. The Chancellor expresses an unfavourable opinion of Jeffrey. When the Judges who saw and heard the witnesses thus differ in their appreciation of the value of their evidence, it is surely impossible for an appellate Court to say that they ought to have acted upon either one story or the other.

I must say, however, that taking Emigh's own version, as reported to us by the shorthand writer, I should have found it difficult, if not impossible, to attribute his acts to any other motive than bribery. I shall read some passages from his own evidence. [The learned Judge here read the evidence referred to, and continued.]

The details in which this evidence differs from that of Moore or Jeffrey are quite beside the main fact which appears as plainly from Emigh's evidence as from Moore's. The only question can be, what is the natural and necessary inference? I should infer that Emigh bribed Moore, and ought to be reported for a corrupt practice. I see nothing from which it could be reasonably inferred that the influence of the act itself extended beyond the man Moore, or could be supposed to have been of any wider extent; but I agree with the Chancellor that it would be improper to hold Emigh to be an agent of the respondent.

The one fact to which Chief Justice Cameron refers as evidence of his agency is that he was a member of the Reform Association. I do not think that alone is, under the evidence in this case, sufficient.

The two corrupt acts of Depotie must, so far as I can judge from the evidence, be measured, both as to their nature and extent, by what we are told in immediate connection with them, and must be classed as "trifling," unless we accede to Mr. McCarthy's argument that no act of bribery can be so called. I am not prepared to apply to the statute that principle of interpretation.

Emigh's corrupt act, though not committed by an agent, would go into the the same scale with those of Depotie for the purposes of scrutiny, and also for the purpose of section 159, if there was such connection between them as would make the one reflect light upon the other, so as to afford better means of estimating its nature and extent. But we see no connection between them.

There is nothing to link them as parts of a system; and therefore the respondent gets the benefit of section 159, unless the charge of treating meetings of electors interferes.

That charge, however, even if established as a statutory corrupt practice committed by Depotie and the two others, would rest on facts from which no inference could properly be drawn that what was done had any appreciable tendency to affect the result.

But in my opinion the charges of providing or furnishing drink or other entertainment to a meeting of electors assembled for the purpose of promoting the election is not established. The meetings in question were not, as I interpret the statute, meetings of the kind to which it relates.

The charge is described by the learned Judges in their certificate as "the treating of committees by the said Depotie and by James Daly and one Woods."

We learn from the evidence and from the judgments delivered that these were meetings of ten persons, or fewer than ten, at the taverns of the persons named, for the purpose of promoting the election of the respondent by discussing the voters' lists and arranging as to doubtful votes. The treating charged was, on each occasion, by one of the tavern-keepers at the tavern of one of the others.

The learned Judges differed in their application of section 151 to the facts, the Chancellor holding that these were not meetings within the meaning of the section, and the Chief Justice taking a different view.

As the section stood for 30 years prior to 1873, it made it unlawful for any candidate for the representation of any county, &c., *with intent to promote his election*, and for any

other person, *with intent to promote the election of any such candidate*, either to provide or furnish entertainment, at the expense of such candidate or other person, to any meeting of electors assembled for the purpose of promoting such election, previous to or during the election at which he was a candidate, or to pay for, procure or engage to pay for any such entertainment. With the exception, which in the Acts* earlier than the Consolidated Statute of Canada, cap. 6, was in the form of a proviso, that nothing in the section contained should extend to any entertainment furnished to any such meeting of electors by or at the expense of any person or persons at his, her, or their usual place of residence, this section was always, at least as late as 1873, grouped with three sections on the subjects of carrying arms, party flags, and party badges, and an offence against any of the four sections was made a misdemeanor punishable by fine or imprisonment, or both.

They occupied the same position after Confederation as before, being sections 61, 62, 63, and 64, of 32 Vic. ch. 21 (O.), section 65, however, naming only the pecuniary penalty. In this Act they were in the division headed, "Keeping the peace and good order at elections."

After the passing of the Controverted Elections Act of 1871, 34 Vic. ch. 3, (O.), in which "corrupt practice" was defined to mean "bribery and undue influence and illegal and prohibited acts in reference to elections, or any of such offences, as defined by Act of Legislature," the present Chief Justice of Ontario, in the *Glengarry Case*, H. E. C. 8, discussed at considerable length the question whether a violation of the section was a corrupt practice, having regard to the words, "with intent to promote his election;" and he referred to several decisions of English Judges under their Corrupt Practices Prevention Act, 1854, secs. 4 and 23, which sections had not then been adopted into our law, but which are now represented by sections 152 and 153 of the Election Act.

* 6 Vic., ch. 1, sec. 33; 12 Vic., ch. 27, sec. 57.

The questions thus raised in 1871 were set at rest in 1873 by the Act 36 Vic. ch. 2, (O.), which extended the definition of "corrupt practices" to include violations of section 61 of the Election Law of 1868, and amended that section by striking out of it the words, "with intent to promote the election of any such candidate," making it read as we now have it in section 151.

In the revision of the statutes the section was removed from the "peace and good order" group and placed in the group headed, "Prevention and punishment of corrupt practices and other illegal acts at elections."

Whether or not these changes have altered the effect of the section, so far as it touches the motive leading to the act which it prohibits, the description of the act itself remains unchanged, with the slight exception of the introduction in 1873 of the words "drink or other" before the word "entertainment." It is "providing or furnishing drink or other entertainment to a meeting of electors assembled for the purpose of promoting such election." The "meeting" intended by the Act of 1873 and by the Revised Statutes, is the same "meeting" intended by the Act of 1842 and all the intermediate Acts, where the avowed purpose of the clause was the preservation of peace and good order.

Attempts have sometimes been made, in argument, to interpret the phrase, "meeting of electors assembled for the purpose of promoting the election" by the aid of speculations as to the probable object of the prohibition, which has not unfrequently been supposed to strike at one form of corrupt enticements of voters. Whatever force such a conjecture may have derived from the words, "with intent," &c., while they remained in the statute, although nothing was said of *corrupt* intent, these words are there no longer, and since their removal, viz., in 1876, the present sections 152 and 153, one dealing with corrupt treating, and the other with treating any voter on nomination or polling day on account of his having voted or being about to vote, have added to the previous list of corrupt practices; and giving meat or drink by way of bribery was always bribery.

We are, therefore, at liberty to render the words we have to construe in the sense which properly belonged to them in 1842, without fear of detracting from the safeguards provided against bribery and corruption.

The opinion which I have formed is, that the "purpose of promoting the election" is not, primarily at all events, intended as the purpose in the minds of those who meet, but is the purpose in the minds of those who call them together. I understand the word "assembled" in the transitive and not the intransitive meaning of the verb, in the sense of convoked or called together. A candidate was forbidden to endanger the peace or encourage disorder by supplying entertainment, now emphasized as "drink," to a meeting of electors whom he had caused to assemble in order that he might promote his election by addressing them or otherwise influencing their votes. In any other reading of the enactment the word "electors" loses its force. Why a meeting of *electors*? I take the meaning to be that they are assembled as electors, and because they are electors. A committee may happen to be composed of electors of the riding, or may not, but their functions as committeemen do not depend on the accident of their having or not having votes in the riding.

My view that the meeting is a meeting of a general character, called together to be acted on, not to act as a meeting, and that the object of the prohibition was and is the preservation of peace and good order, is not weakened by supposing the prohibition to have had some reference also to checking the use of corrupt influence. That consideration does not affect the question of the nature of the meeting otherwise than by calling attention to the improbability that the Legislature was providing against a candidate influencing, by a corrupt device of the kind, persons who were already his supporters, and who *ex hypothesi* had come together with the purpose of promoting his election already formed.

It is needless to say that the possibility of abuse by calling by the name of a committee what is in reality a gen-

eral meeting of the electors forms no argument in the construction of a written law, although it may be a reason for vigilance in its administration.

I am aware that there may seem to be some difficulty in assigning a reason for everything in the section. It may not at first sight be apparent to what precise state of facts the proviso was intended to apply. It may be capable of suggesting, and, if I am not mistaken, it has suggested in this case, that no meetings except committee meetings are covered by the prohibition, because it may seem unlikely that the Legislature supposed that any person or persons would invite electors, in any other character than as a committee, to assemble at his, her or their usual place of residence. This view may prove too much if it confines the operation of the law to mere committee meetings; but it is founded only on conjecture, not on anything found in the expressed intention of the Legislature.

My interpretation of the clause does not seem to me to involve any incongruous or absurd results. On the other hand, if the purpose in the minds of those who meet is the criterion, how shall we define a meeting? If two members of a party meet by appointment at their club to talk over their plans for the election, does one of them commit a corrupt act by asking the other to join him at lunch or to take a glass of wine?

wf me . 7 I believe the question as to the class of meetings intended is yet unsettled by actual decision. We have been referred to the *North Grey Case*, H. E. C., 362, in which Mr Justice Ferguson is said to have held that a committee meeting was within the statute. No question seems to have been argued in that case as to the character of the meeting. We have no report of the facts, beyond a short allusion to them in the judgment. There must have been something which does not appear in the report, in addition to the mere construction of the section, to influence the decision. The meetings were at one Wright's tavern. The charge was that Wright was guilty of corrupt practices by treating at those meetings, and that charge being sustained by

the learned Judge without anything being said in his judgment to explain why Wright was not protected by the proviso, one naturally feels that something must have appeared which we do not find stated.

Then the learned Judge gives his reasons for considering that the members of the Liberal Conservative Association who composed the meetings were not agents of the candidate. "What was done at those meetings," he said, "or for what purpose they were assembled did not very clearly appear. It may be admitted that the members of the association who assembled at Wright's were electors assembled to promote the election of the respondent within the 61st section of the Act of 1868, as amended by the Act of 1873, so as to make Wright himself guilty of corrupt practices in supplying drink to them at or immediately after their meetings; but they were not, that I can say, in any sense the agents of the respondent, or in any way authorized by him, nor does it appear from the evidence that he had any knowledge of their meeting." This discussion of the agency of the parties treated is another thing which indicates that the learned Judge was really dealing with something outside of section 61, though he may not have enabled us to see clearly what he may have had in his mind. If Wright had been an agent, a corrupt act by him might have affected the candidate, but it made no difference, so far as section 61 was concerned, whether the people treated were agents or not. It is scarcely open to us to seek for an explanation in the supposition that some of these other people may have treated as well as Wright, because, if that were so, they would have been reported along with Wright for the corrupt practice. Whatever may be the explanation of the judgment, it is certain that the learned Judge was not considering whether or not a committee meeting was within this section. His point is that, assuming it to be within the section, nothing was done which affected the respondent.

This decision cannot therefore be taken as an authority in the present case.

Almost all the cases that have arisen for the application of the section have been with reference to general meetings, the most important being probably the *Muskoka Case* (a), recently decided in this Court, and I do not know that it has hitherto been doubted that these meetings are within the section.

In applying the law to them the word "assembled" has been understood as having the force which I attribute to it, and which, in my judgment, satisfies the grammatical meaning as well as the intention of the section.

I think we should decide the questions on which the learned Judges differed by holding that the respondent was duly returned and elected, and that it should be so certified to the Speaker, and that the costs of this reference to this Court be disposed of as part of the costs of the case, in pursuance of sections 97, 98 of the Controverted Elections Act, having regard to section 160 of the Election Act.

OSLER, J. A.—With regard to the charge of corrupt practices, under section 151, of furnishing entertainment to or treating a meeting, I must confess that my impression has been that when the question came to be examined, it might be found that meetings of committees were not within the section, but having now given it the best consideration in my power in the light of the arguments addressed to us, and the judgment of the learned trial judges, I am unable to adopt that view.

I think we do not derive much light from the legislation prior to the Act of 1868. Under section 61 of that Act, which made the intent with which the entertainment was furnished the material ingredient in the offence, it was not difficult to hold that it was wanting in the case of a meeting of committee-men all of one way of thinking, and presumably beyond the reach of influence of that kind.

On this ground proceeded the *South Grey Case*, H. E. C. 57, and the *West Toronto Case*: *ib.* 97, 106.

(a) ante p. 197.

The decisions after the Act was amended do not present any preponderance of authority either way. We find opposite expressions of opinion by Draper, C.J., and Gwynne, J.

The *North Victoria Case*, H. E. C. 259, 260, is referred to by the learned Chancellor, but the only thing there decided on this point seems to be, that the meeting to which the entertainment had been furnished was not a meeting of electors assembled, &c., but a casual gathering of a few persons who had remained after a public meeting had assembled.

In the *Halton Case*, H. E. C. 285, the learned Chief Justice undoubtedly expressed an opinion that a meeting of electors all of one way of thinking to support a particular candidate, or of a committee to aid in his return, at which refreshments were furnished at the expense of one or more of them, could not, except in some extreme case, be decreed a breach of the provisions against treating.

On the other hand, Mr. Justice Gwynne, in the *North Grey Case*, H. E. C. 362, expressly referring to the amended Act, says: "It may be admitted that the members of the association who assembled at Wright's were electors assembled to promote the election of the respondent, so as to make Wright himself guilty of a corrupt practice in supplying drink to them at or immediately after their meetings."

The report of the *West Hastings (2) Case*, H. E. C. 539, in which one of the corrupt practices proved was a breach of the 151st section, does not shew the character of the meeting. I think it is rather to be inferred that it was not a committee meeting. Looking at the plain unequivocal language of the section—at the exception it contains in favor of meetings at the usual place of residence of the entertainer, and at the amendment introduced in 1873, which made the intent no longer material—I am forced to the conclusion that a meeting of committee men, being electors specially called or assembling by previous regulation or arrangement, is a meeting within the meaning of the section. While I agree with the views which my lord

the Chief Justice has expressed on this subject, I cannot help regretting that we are thus compelled place as it were to another stone of stumbling and rock of offence in the path of the candidate. Offences against this section ought to be merely illegal acts, punishable by fine; not corrupt practices in themselves avoiding the election.

It remains to be considered what other corrupt practices have been proved, and whether the election can be maintained under sect. 159.

In the *East Simcoe Case* (a) I endeavored to express my views of the meaning of that section, and of the manner in which its remedial or saving powers should be applied. I need not repeat them.

I pass over for the present the bribery of Moxley, as the learned Judges agreed as to that, and their finding has not been impugned.

There is, first, the alleged bribery of Littleton by Depotie. Putting together the facts that Depotie received \$5 from Jarvis on the night in question, manifestly for corrupt purposes: that between nine and ten o'clock the same night he went to see Moxley and Littleton about their votes, and that he is found to have bribed the former; the peculiar manner in which the money was placed in Littleton's possession, and the timely repayment of the \$5 to Jarvis during the trial—I think, unless we are to suspend our judgment until we hear an admission of a formal verbal agreement between briber and bribed, the proper inference and conclusion should be that the payment or gift or loan by Depotie to Littleton was given and received as a bribe.

The charge of bribery of Moore by Emigh is also, in my opinion, amply proved; but I do not think Emigh is shewn to have been an agent of the respondent.

The payment of \$4 to Hurley the bill-poster, though not free from suspicion, may, I think, looking at Mr. Macdonald's evidence, be regarded as not a corrupt one.

We have, therefore, one isolated case of bribery and two of personation by persons not agents of the respondents,

in addition to the treating of a committee meeting by one agent, and three cases of bribery by other agents, by the furnishing of money for the purpose of bribery by Jarvis to Depotie; and the bribery of Moxley and Littleton by the latter.

The corrupt practices avoid the election, unless the respondent can succeed in shewing that they were so trifling in their nature and extent that the result could not have been affected, or be reasonably supposed to have been affected thereby.

I put aside altogether the treating of the committee, as in the circumstances wholly innocuous; but I think the bribery cannot be so easily disposed of. We have it in evidence that Mr. Jarvis, an agent of the respondent, not perhaps a chief agent, but a prominent supporter who had been in the previous year the secretary of the party association, was engaged, to the knowledge of the respondent and financial agent, in getting up a subscription list to meet the expense of the election, other than the respondent's personal expenses: that only part of it had been received by the financial agent, the only person by law permitted to make any payment for the purposes of the election: that the subscription list in question was neither produced nor accounted for; and that Mr. Jarvis, though a Division Court official living within a mile or two of the Court House, and though informed by the financial agent of the respondent that he was charged with bribery, kept out of the way and was not present at the trial. Taking these facts in connection with the other facts proved; of Jarvis dealing with Depotie, and the latter's consequent bribery of Moxley and Littleton, the inference is strong that an agent of the candidate, other than the financial agent was in possession of a fund subscribed for the purposes of the election which he had not accounted for, and that two persons were bribed out of moneys furnished by the collector of that fund.

Corrupt practices having been thus proved, the onus was cast upon the respondent of producing Jarvis, or, in some other way of accounting for the disposition of the

election fund. In the absence of all explanation as to this, it seems to me that the bribery was committed under circumstances, and emanated from a source, which preclude it from being judicially deemed to be of so trifling a nature that the result cannot have been affected, or be reasonably supposed to have been affected thereby.

For these reasons I think that the election is not only avoided, but that it is not saved under the 159th section.

The Registrar of the Court should therefore be directed to report to the Speaker of the House that the election is void, and that the respondent has not been duly elected or returned.

EAST SIMCOE.

PROVINCIAL ELECTION.

BEFORE BOYD, C., AND CAMERON, J.

ORILLIA, October 30, 1883.

BEFORE THE COURT OF APPEAL.

Present :—CHIEF JUSTICE HAGARTY, MR. JUSTICE BURTON, MR. JUSTICE PATTERSON, and MR. JUSTICE OSLER.

TORONTO, October 31, 1884.

November 11, 1884.

ISAAC REID, *Petitioner*, v. CHARLES DRURY AND SAMUEL LOUNT, *Respondents*.

Elections—Delay in opening poll—Insufficiency of ballot papers—Delay—Omission to take oath of secrecy—Result not affected—Relief under sec. 197—Holding nomination after time fixed therefor—Imperative or Directory—Estoppel—Corrupt acts—Bribery—Selling liquor—Relief under sec. 159—Construction of—Agency—Evidence of—Intimidation—Dismissal—Appeal.

(1) At a polling sub-division, through a series of mischances, and without any wilful default of the officials, the poll was not opened till between half-past one and two, whereby it was charged a number of electors were deprived of voting. The petitioner failed to prove the charge, while, if the onus of doing so were on the respondent, he showed there was ample time to poll all the votes at that sub-division, and that all who desired to vote could have done so ; (2) The supply of ballot papers at a polling sub-division, through a blunder of the officials, ran out, and, while waiting for instructions the poll was closed for half an hour, whereby, it was charged, some seventeen voters were prevented from voting ; but as a matter of fact none of these voters were prejudiced thereby, (3) The Deputy-Returning Officer and subordinate officers at a polling sub-division, through impropriety, but not *mala fide*, did not make the declaration of secrecy, required by sec. 147 of R. S. O. ch. 10 ; but the result was not affected thereby.

Held, by the trial Judges, BOYD, C., and CAMERON, J., that as these grounds of irregularity did not *per se* affect the result, they came within the protection of sec. 197, and did not avoid the election

Under sec. 33 the Returning Officer is to fix the place and time of nomination, such time to be between eleven a. m., and two p. m., of the day fixed therefor. The Returning Officer, who lived at B., owing to inevitable accident arising from the train being blocked with snow, did not reach O., the place of nomination, till 2 p. m., and the hustings until ten minutes afterwards. The two candidates who contested the constituency were then nominated in the presence of a large number of electors, including the petitioner, who made no protest. It did not appear that any injury had been caused thereby.

Per BOYD, C.—The requirement was merely directory or regulative : that non-compliance therewith might or not be fatal, and so avoid the election, according to circumstances ; and that as no one was prejudiced, it could have no fatal effect. In any event the petitioner, under the circumstances, was estopped from raising the objection ; and *Seemle*, he was also precluded from raising the objection by reason of, as it appeared, his claiming the seat for the defeated candidate, thus ratifying and adopting what was done at the election.

Per CAMERON, J.—The requirement was imperative, and non-compliance therewith avoided the election ; and the petitioner was not estopped from raising the objection.

On appeal to the Court of Appeal, the judgment proceeded on another ground.

Per BURTON, J. A.—The point was now covered by sec. 48 of 47 Vic. ch. 4, (O.)

Per PATTERSON, J. A.—*Quære*, whether sec. 48 was intended to apply to this point, this being a matter specially dealt with by sec. 15 of R. S. O. ch. 10.

H. was a prominent supporter and agent of the respondent, secretary of the reform association of the riding, delegate to the convention which nominated respondent, and an active organizer and manager of the election contest. R., a voter, well known to H., as what he called a “loose fish,” and belonging to a family reputed to sell their votes, came to H., and asked for money for his vote ; not succeeding, he returned next day and made a similar request. Finally he asked for \$5, because, he said, he was sick and hard up, and wanted to pay his taxes. Whereupon H. gave him \$5, but on R. pledging his word that it had nothing to do with his vote. R. told T., another voter, that if he wanted \$4 or \$5 now was his time, and introduced him to H. T. asked if any money was going, and offered his own vote for \$10, and his father and three brothers for \$20. H. gave him \$4, calling it a loan, and on T.’s word of honour that it would not influence him in the election. H. also hired the team of a man named C. for the election day. The election was very close, over 2,700 votes being polled, and respondent’s majority about twenty-three.

Held, that these were clearly corrupt acts ; but *per* BOYD, C., they did not avoid the election as they came within the protection of sec. 159 ; and *per* CAMERON, J., that they did avoid the election, as they were not within the said protection.

Per BOYD, C.—The scope of the section was that an election should not be set aside for two or three illegal acts of a trifling nature or extent, where the majority is considerably more than the votes affected, unless these illegal acts and practices prevailed, and were so influential, extensive and insidious, as to induce the probable and reasonable belief that but for such acts and practices the result might have been different, while here, after striking off the corrupt votes, the respondent would still have a majority.

Per CAMERON, J.—The extent of the influence of the corrupt acts is not to be measured or estimated merely by the number of corrupt votes, but in connection with the influence of the party proved to be guilty of its commission, and by the opportunities he may have had of resorting to like practices in other cases.

On appeal to the Court of Appeal—*Held*, affirming the finding of CAMERON, J., [BURTON, J. A., dissenting,] that the corrupt acts did not come within the protection of sec. 159; and therefore the election was avoided.

Another charge was that F., a licensed hotel keeper, about four o'clock on the polling day served H. and a voter with drinks in his bar-room. F. was a member of the reform association, and generally took part in elections. He attended the meeting called for the nomination of the respondent, but he took no active part in it. On the election day he drove electors to the poll, but it did not appear on which side he was voting. The president of the reform association said he did not think that F. worked for the respondent, and understood he was a friend of the defeated candidate; and H. said he thought he was working for the respondent.

Per BOYD, C.—The evidence failed to shew that F. was an agent of the respondent.—*Per* CAMERON, J., that it was sufficient to establish such agency.

On appeal, OSLER, J. A., concurred with BOYD, C. The other Judges did not consider the point.

C. occupied as a boarding-house, a house of a lumber company rent free, and was paid for boarding the men by the men themselves, but through the company retaining the amount thereof out of their wages. C. acted as scrutineer for the defeated candidate, and while so acting, but after he had voted, was sent for by P., the company's manager, an agent of the respondents, and given to understand that his so acting was not satisfactory to the company and against their interests. No threat of any kind was made. C. returned to the polling place and continued to act, but on reflection, about 12 o'clock, he ceased to do so. C. had canvassed the men at the boarding-house for the defeated candidate, for whom some had promised to vote, and a good many of the men had voted before he left. It did not appear that what P. had said to C. was communicated to any voter, or that any voter was influenced thereby.

Held, that a charge of intimidation was not proved.

After the election C. received notice of dismissal from the company, and was informed by P. that it was for talking too much in the election about one of the hands having been sent away to prevent his voting. It was charged that C. was dismissed on account of his having voted at the election.—*Held*, that that the charge was not proved.

Per OSLER, J. A.—On a proceeding of this kind, the whole case is before the Court of Appeal on the evidence, and ought to be disposed of in all respects as on an appeal from the trial Judges.

THIS was a petition filed by Isaac Reid, an elector of the electoral division, against Charles Drury, the successful candidate, and Samuel Lount, the returning officer.

The petition contained charges of certain irregularities committed in the conduct of the election, and of corrupt practices; and prayed to have the election avoided.

McCarthy, Q. C., and *A. R. Creelman* for the petitioner.
S. H. Blake and *William Johnston* for the respondent.

The facts are stated in the judgments of the learned Judges who tried the case.

BOYD, C.—I propose to deal first with those illegalities which affect the form, before discussing those affecting the substance of this election.

1. At polling sub-division II, in Tiny, the poll (through a series of mischances, without any wilful default on the part of the officials), was not opened until between half-past one and two in the afternoon of the polling day. The petition alleges that this poll was closed before five o'clock, but that is disproved. The burden of the complaint is, that in consequence of this irregularity many electors entitled to vote at that poll, and who attended to vote, were deprived of the opportunity of doing so.

The charge as alleged is not proved. But if the onus is on the respondent I think he has sufficiently shewn that there was ample time from two to five to poll all the votes at that sub-division, and that all who desired to vote could have done so; and did in fact vote thereat with three (perhaps four) exceptions; those being the three voters who arrived five or ten minutes late after the close of the poll; and one Perry, whose evidence was not given in a very lucid manner.

As to the others, not admitted to be accounted for, the reasonable inference from all the evidence is, that they did not attend and did not mean to attend during that day to vote. I refer to Wm. Chappell, P. Perrault, Geo. and W. C. Matchett, and Frederick and Henry Morran. See *Monck Case*, 32 U. C. R. 148.

2. At polling sub-division No. 1 of Tiny, through a blunder of the officials the supply of ballot papers ran out, and in consequence, and while waiting for instructions, the poll was closed for about half an hour. It is alleged that thereby seventeen electors were prevented from voting. I think this disproved.

The result of all the evidence leads me to believe that none of these seventeen were prejudiced by what happened. Becket either voted or was not there during the day. Coates was not present that day, nor was Dingman nor Prentice.

Section 197 of R. S. O. ch. 10 (a) is wide enough to cover both cases of irregularity; and it is proved that the election was conducted in accordance with the principles laid down in the Act as defined by the authorities; that is to say, the voting was secret and by ballot, and all the electors had a free and fair opportunity of casting their votes: *Hackney Case*, 2 O'M. & H. 77, 83.

As to these the only doubtful matter is, whether the provisions as to secrecy were violated because the Deputy Returning Officer and the subordinate officers at sub-division II. of Tiny, failed (improvidently but not *mala fide*) to make the declaration of secrecy under R. S. O. ch. 10, sec. 147. But that provision only imposes an additional sanction upon the statutory injunction (sec. 146) that absolute secrecy shall be maintained by these officers. A penalty follows upon any violation of this duty whether the oath be taken or not.

Altogether apart from the declaration it is to be assumed, in the absence of evidence, that the officers have been duly reticent and observant of the substance of what is enjoined upon them, though they be in default in not taking the formal pledge of secrecy.

This omission will not invalidate the election, unless at the least it be made to appear affirmatively that the spirit of the Act in that regard has been violated.

The principle of the decision of Mr. Justice Barry in the *Drogheda Case*, 2 O'M. & H. 201, but better reported in 18 Sol. J. 647, is entirely applicable. He there held that the use of two rooms not opening into each other for the purpose of voting, involving the possibility that in passing

(a) "No election shall be declared invalid by reason of a failure to hold a poll at any place appointed for holding a poll, or by reason of a non-compliance with the rules contained in this Act as to taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and such failure, non-compliance, or mistake did not affect the result of the election."

from one room to another a voter might shew his ballot paper, will not, in the absence of proof that any voting papers were actually shewn, invalidate the election. See also the *Colchester Case*, 1 Peck. 507, and the *Limerick Case*, P. & K. 368.

There is no reason therefore for not giving full effect to the curative provisions of section 197, as not more than one vote (if even that) appears to be affected by these irregularities.

3. There remains to be considered a matter of greater gravity, for which legislative provision should be made whether or not the objection now prevails.

It is objected that the whole of the election proceedings are nugatory and null because not initiated before the hour of two o'clock on the day fixed for the nomination of candidates. Owing to an inevitable accident arising from the train being blocked with snow, the Returning Officer, who lived at Barrie, did not reach Orillia, the place of nomination, till two o'clock of the day so fixed, and did not consequently get to the hustings till ten minutes after two. At that time he proceeded with his duties under sec. 48 of R. S. O. ch. 10, in the presence of a considerable assembly of electors. The two candidates who contested the constituency were then nominated, and that in the presence of the petitioner who now urges this difficulty. He made no protest then, and he should not, in my opinion, be allowed to raise this objection now, as it does not appear that the slightest injury has been done to the riding or to any one in it by the failure to begin proceedings at the proper hour.

The writ of election which founds the jurisdiction of the Returning Officer, fixes the nomination day, but not the hour.

Under the statute (sec. 33), the Returning Officer is to fix the place and hour; it being provided that the hour shall be between 11 a.m. and 2 p.m. of the day named for opening the election. This was complied with by the officer fixing one o'clock as the hour. At that hour on the proper day the officer was proceeding (under sec. 48) to the hustings when

he was delayed by the cause mentioned. But I infer that the assembled electors were aware of the reason of the delay, and waited till the officer arrived. Thereafter the proceedings went on as if they had been begun at the hour and with the same result, namely, that a poll was demanded, and the further prosecution of the election stood over till the day fixed for polling.

An election begins on the day of nomination, and in the event of a contest, continues till the declaration of the poll is made by the Returning Officer. The day of nomination is also called in the Act "the day of the opening" (secs. 194 and 48); and, if only one candidate is nominated, it is also the day of closing the election (sec. 51). But if a poll is demanded, the nomination day becomes merely a preliminary to ascertain the candidates who are about to seek the suffrages of the electors on polling day: *Anthony v. Seger*, 1 Hag. Con. R. 13.

The same particularity is observed in the Act in providing the hours appointed for voting on polling day (sec. 58) as in fixing the hours for holding the election on nomination day (sec. 33).

But it is well settled that any delay in opening the poll will not annul the election, unless it appears that some mischief ensued, or that the result was affected.

Similarly, there is no good reason why an omission to open the proceedings at the appointed hour on nomination day should be fatal, if no solitary elector is harmed. This view appears to me to have prevailing force where the election was not closed on nomination day and where the party complaining attended at the hustings and had ample opportunity, if he wished, to nominate his candidate or to propose himself to the electors then present. The whole proceeding took place upon the day during which the officer had jurisdiction by the terms of the writ, and that is the essential thing to be regarded (secs. 26, 28, 52, 54, 55 and 140).

The time within which he is to act on that day is a matter directory, any deviation from which is not necessarily disastrous to the further prosecution of the election.

The view of Lord Hardwicke in an analogous case is very pertinent here ; and it is thus expressed : “ This mention of hours in the statute is certainly directory, and not restrictive, and intended to prevent surprise by beginning at inconvenient times ” : *Rex v. Poole, Lee Ca. t. Hard.* p. 27. He refers to the case of *Launceston* in 1 Roll. Abr. 513, 514. “ That corporation chose their officers eight days after the charter day, and adjudged good, for that the day was only directory.”

Here, as I conceive, the pith of the matter is, that the election should begin on the day fixed in and by the writ ; but that it should punctually begin between the hours fixed by the statute is directory and regulative, so that any failure to observe such limit may or may not be fatal, according to circumstances.

In the *Longford Case*, 2 O'M. & H. 6, 8, Fitzgerald, J., intimated an opinion that the action of the sheriff in fixing a day for the election other than that directed by the law would not, *per se*, vitiate the election ; and see *Cunningham* on Elections, 2nd ed., p. 93.

Mr. McCarthy argued that the healing clauses sec. 197 R. S. O. ch. 10, and sec. 8 of 42 Vic. ch. 4 (O.) implied that irregularities not provided for therein were to be treated as fatal, applying the maxim *expressio unius*, &c. But I rather think that both provisions are of a declaratory nature, and thus enacted for the sake of caution.

The *Seaford Case*, 3 Lud. 25, on which he relied, is quite at variance with Canadian Parliamentary decisions.

Thus in the *Cornwall Case*, Pat. El. Prec. 103, it was objected by electors as petitioners that only seven days' notice of the election was given instead of eight. The resolution of the committee was that eight clear days' notice was required by the statute : that the conduct of the returning officer was not in accordance with the Act : that there was no reason to believe that the result of the election was affected by the irregularity ; and that the sitting member was duly elected.

Again in the *Stormont Case*, Pat. El. Prec., 107, the same conclusion was affirmed with this additional resolution, that the words “‘at least eight days’ are imperative with regard to the Returning Officer, but cannot have the effect of rendering the election void, when the insufficiency of notice has not deprived any elector of his right to vote.”

So in the *Norfolk Case*, Pat. El. Prec., 79, the closing of a poll before the hour appointed was not considered a fatal objection.

These Canadian precedents are in accord with many more modern determinations of English Parliamentary Committees which are collected in the *Limerick Case*, P. & K. 365, and in the *Athlone Case*, B. & Ar. 115, 126.

The object and intention of the statute was substantially complied with and satisfied by what was done in the present case. The electors were summoned to meet at the proper place on the proper day for the purpose of exercising jurisdiction in choosing parliamentary candidates. This they did under the direction of the proper presiding officer, and not the slightest suspicion of injury can be suggested to have arisen from the failure to open proceedings at the precise hour appointed.

This being so, the passage in *Maxwell* on Statutes, p. 337, which was cited by Mr. Justice Fournier in *Jenkins v. Brecken*, 7 S. C. R. 247, at p. 271, is also apposite here. It is in these words: “Where the prescriptions of a statute relate to the performance of a public duty, they seem to be generally understood to be merely instructions for the guidance and government of those on whom the duty is imposed, or directory only. The neglect of them may be punishable, indeed, but it does not affect the validity of the act done in disregard of them:” See also *Lincoln Case*, 2 A. R. 324, 336; *Caldow v. Pixell*, 2 C. P. D. 566, 567. If any injury to the petitioner, or to a single other elector had been proved, I do not say that my conclusion would be as it is now. (See *Regina v. Rector of Lambeth*, 8 A. & E. 356; *Rex v. Denbyshire*, 4 East 1428, and *Pearse v. Morrice*, 2 A. & E. 96).

But without dwelling longer upon this part of the case, I desire to direct attention to this state of the law that such amendment may be made as will save future elections from attacks which while unquestionably technical and unmeritorious, may nevertheless render it impossible to uphold the return.

Taking this view I am not obliged to rely upon another ground, which would be fatal, I think, to the success of this contention. It is this. The petitioner claimed the seat for the opposing candidate in and by his petition. He thus adopted and ratified what was done at the election, so far as he was personally concerned; and, having thus elected, it would be against principle to allow him to abandon that part of his petition in order to qualify him to attack the whole election proceedings. See *Aldridge v. Hurst*, 1 C. P. D. 410.

Next in order to be dealt with are the corrupt practices and other illegal acts complained of in the petition and particulars. Two acts of bribery are brought home to the respondent's agent, Wm. M. Harvie—those numbered 4 and 5 in the particulars. His agency is not disputed, and, from the evidence of all the parties implicated, the inference of guilt is irresistible. Perhaps the plainest case is that of the loan to John Thornton. He gave his evidence in a more satisfactory way than did his associate, Dan Regan, and in all material matters he is not contradicted—rather is he corroborated by Mr. Harvie. The well established facts of the transaction with Thornton are these: Harvie knew him merely by sight. A few days before the polling day he came to Harvie and asked if any money was going, and then offered his own vote for \$10, and undertook to secure the support of his father and three brothers besides for \$20. The result was that Harvie gave him \$4 at the same interview, (calling it a loan), and taking Thornton's word of honour that it would not influence him in the election. Harvie says: "I don't know why I lent it to Thornton except that he asked for it." Thornton says that it was Harvie who volunteered to lend him the \$4.

using these words: "I'll lend you \$4 and recollect I'm buying no vote." No other conclusion can be drawn from the circumstances than that the pretence of a loan is of the flimsiest texture through which the substance of the transaction is plainly manifest. The propensity to lend money to comparative strangers who are hawking about their votes for sale pending the election should be sedulously repressed by all electoral agents. Thornton took his cue from Dan Regan, who was well known to Harvie as being personally what he describes as a "loose fish," and as belonging to a family who enjoyed a reputation for selling their votes. This man, some days before the Thornton loan, came to Mr. Harvie and asked money for his vote. Not succeeding he returned next day, and the same scene was repeated. Finally he put the request in this way, as stated by Mr. Harvie. He said he "wanted \$5 because he was sick and hard up, and wanted to pay his taxes;" whereupon Mr. Harvie said, if you give me your word of honour that it has nothing to do with your vote I'll give it to you. Dan Regan had no difficulty in giving this pledge, and took the \$5. He forthwith sought out John Thornton, and telling him if he wanted \$4 or \$5 for his vote now was the time. He proceeded to introduce him to Mr. Harvie with the result already detailed.

One other charge against Mr. Harvie, which was allowed to be added in the amended particulars, that is, the hiring of Timothy Connor's team for the polling-day, is also established. Any hesitation which I might have felt in acting upon the sole testimony of Connor, is removed by the admission of Mr. Harvie, and his inability to contradict the direct affirmations of the other witness.

Charge No. 14 is proved as alleged; namely that on the day of polling Patrick Finn, a licensed tavern-keeper, did during the hours of polling, give liquor to persons in his tavern which was within the prohibited limits. The only distinct evidence on this head is that of Mr. Harvie, who says that about four o'clock on that day he and Hugh Mellen were served by Finn with a drink in his bar-room

but it is not expressly alleged, nor does the evidence, so far as given, warrant the conclusion that Finn was an agent of the respondent.

There is vague evidence of his being active to some extent on the polling day in getting voters to the poll, either by himself driving or letting his cutter be used for that purpose. But whether he volunteered or was hired, and to which party the voters belonged, are points not made clear. Finn appears to have just looked in at the first Reform committee meeting which was called by advertisement addressed to the electors generally of that party, but took no part in the proceedings during the minute or two that he was there.

Mr. Harvie says: "I do not think Finn was working for our side the day of polling or before;" and Mr. Robinson, the president of the Local Reform Association, says, "I do not think Finn worked; he was a friend of Thompson's (the Conservative candidate) and promised him not to work; that is what I understood."

This is not such evidence as would justify a finding that Finn was an agent of the respondent.

Charges 22 and 23 are not established.

The substance of them is that an elector, Clarkson, being in the employment of the Georgian Bay Lumber Company, was intimidated by certain officers of the company, who were also agents of the respondent, by threatening him with dismissal from their service, in order to induce him to vote for the respondent, and that he was dismissed from the service in consequence of his having voted at the said election. The facts are that after he had voted for the Conservative candidate, Mr. Peckham, the superintendent of the company, remonstrated with him for taking an interest on that side, saying that any of the men voting that way were voting against the policy of the company, and that he was voting the bread and butter out of his mouth (or out of "our mouths"). The man was afterwards dismissed, not, in my opinion, because he had voted, but because he subsequently made comments upon some members

of the company which Mr. Peckham heard of and deemed sufficient to justify his dismissal. Opinions may differ as to the company's course; but my present business is to ascertain whether this has been an invasion of the 155th sec. of the Act, and I fail to find grounds for any such conclusion.

Taking this view of the evidence, it is not needful to consider the additional difficulty in the way of the petitioner in establishing Mr. Peckham's agency, as to which I am by no means satisfied.

As to charge 32, we intimated during the argument that the evidence failed to satisfy us that it was well founded; an opinion I still retain.

In like manner the evidence does not support the truth of charge 41 as to the hiring of teams on polling day from McKinlay. He was a supporter of the Reform party, working on the committee, and with others volunteered the use of his horses and sleighs, he and the other members knowing that it was illegal to hire them for that day.

Out of the 78 original charges and the several additional supplementary charges, these that I have dealt with are the only ones which Mr. McCarthy contended were proved. It remains upon this part of the case to consider the effect of the two acts of bribery and the one act of hiring a team in avoiding the defendant's return, having regard to the provisions of sec. 159 (a). Under sec. 163, the votes of Harvie and Dan Regan and John Thornton would on a scrutiny be annulled for bribery, and that of Patrick Finn for "corrupt practices," under sec. 157 and sec. 2, sub-sec. 11, of the Election Act. But Hugh Mellen's vote would not be affected, as was decided in the *Lincoln Case*,

(a) "To prevent the expense and trouble of new elections when unnecessary and useless in case of a corrupt act or acts being committed by an agent without the knowledge and consent of the candidate, if the corrupt act or acts was or were of such trifling nature, or was or were of such trifling extent, that the result cannot have been affected or be reasonably supposed to have been affected by such act or acts, either alone or in connection with other illegal practices at the election, such corrupt act or acts shall not avoid the election."

H. E. C. 500. We know, however, that John Thornton voted for Mr. Thompson, as he himself in the evidence gave that information. That would leave three votes to be struck off the majority of 20 obtained by the respondent. Timothy Connor's vote might not be affected on a scrutiny (see *Brockville Case*, H. E. C. p. 129), but this need not be dwelt upon, as he tells us he voted Conservative that day.

Assume further that but for the bribe Dan. Regan would have voted the other way, and that while reducing the majority to 16 would not substantially change the result, then, what other illegal practices are proved which deserve consideration in this aspect of the case?

There was some drinking at Finn's after the close of the polls which cannot much, if at all, be regarded; and a tavern-keeper named Osser, at Jarratt's Corners, kept his bar open and sold liquor in the usual way to all comers on polling day, to the extent of about ten dollars.

No other acts of drinking at Finn's during polling hours were proved, and the sale of liquor at Osser's was not connected with the respondent or his agents, and could not have appreciably influenced the voting in favor of either candidate.

Mr. McCarthy strenuously argued that the effect of Mr. Peckham's interference with his employees' freedom of franchise was of itself enough to turn the scale against the respondent; but, in my judgment, the evidence falls far short of what is needful to shew that any efforts were made by Mr. Peckham to interfere with any of his hands other than what appears in the Clarkson case.

It does not appear that what was said to Clarkson was communicated to any other voter, or that any voter was in any degree influenced thereby. Clarkson had voted and was acting as one of the Conservative scrutineers when he was sent for by Mr. Peckham, and the language was used, which I have quoted. This had no immediate effect upon Clarkson; he went back to the polling booth and continued his work as scrutineer for an hour; and upon reflection he

came to the conclusion that he ought not to work against the interests of the company, and resigned. Afterwards he walked about, saying nothing to anyone touching the election, for the rest of the day. He said, upon cross-examination: "I believe all the men I had spoken to voted during the day, and some of them voted before I withdrew; I have no reason to suppose that they were affected by what happened to me; I think they voted as they had agreed with me."

I do not see why I should view the matter more unfavourably for the respondent than it is put in this evidence; and my conclusion is that the interview of Clarkson with Peckham had no influence upon the voting; and that it should be practically eliminated in considering the effect of "illegal practices" at the election.

No illegal practices are proved to have taken place (apart from the two acts of bribery and the hiring of the team) except the sale of liquor to two persons at Finn's tavern during polling hours and the keeping open of Osser's tavern during the whole of the polling day, which can be reasonably supposed to have affected the election; and these would not, in my opinion, appreciably alter or affect the result.

While the Imperial Parliament has to some extent mitigated the severity of the election law by exonerating the candidate in certain cases of corrupt practices on the part of agents, when the offences are committed without the sanction or connivance of the principal, and are of a "trivial, unimportant or limited character," Imp. Act, 46 & 47 Vic. ch. 51, sec. 22, yet bribery is not included in the category. Under the Ontario Act, however, bribery is included; and the election is not to be avoided if the acts were of such trifling nature or of such trifling extent as not to affect the result.

There is the express decision of the Judges who sat in the *Lincoln Case*, H. E. C., p. 493, that two acts of bribery by an agent did not extend beyond the votes affected, and did not vitiate the election.

The only additional act here with which the agent is chargeable is the hiring of Connor's team.

I am inclined to suspect that there was a trap laid for him in this instance into which he fell ; but the act *per se* is, as affecting the result, of a trifling and unimportant nature.

In the *Lincoln Case*, already cited, where the majority was three more than in the present case, the additional acts which induced the Judge to avoid the election were another act of bribery by another agent and a considerable expenditure of money (\$150) by agents of the respondent for election purposes, which were not satisfactorily explained or defined. A further outlay of money by which the taxes of nine persons were paid to enable them to vote, and an extensive system of betting engaged in by three men in the interest of the respondent. These matters being considered cumulatively, the Judges thought that but for them the result would have been the other way : p. 498.

In the *West Hastings Case*, H. E. C. 539, the majority was 337. It was proved that two agents of the respondent had certainly bribed between 40 and 50 voters and presumably many more : that two places were open during the whole of polling day for the supply of ardent spirits to voters at the instance of the respondent's agent : that on the evening before the polling day a large meeting was entertained contrary to law by another agent. There were also two cases of personation.

The Court held that there had been instances of nearly every corrupt practice forbidden by the election law ; and that it was impossible to say that such numerous and extensive illegal practices had not affected the result ; and the election was avoided : p. 545.

In the present case the acts of corruption were by one agent, and isolated. There was no improper expenditure of money, no meeting supplied with forbidden refreshments ; no open or notorious treating during the hours of polling ; no illegal practices affecting a number of people, and nothing objectionable in the conduct of any agent of the re-

spondent, save the corrupt outlay of the two sums of \$4 and \$5, and the hiring of one team by Harvie.

I do not see that enough should appear to reverse the result in order that the election may be avoided under sec. 159. The important words of that section are "affect the result."

Practically I do not differ from the interpretation put upon them by Mr. Justice Grove in the *Hackney Case*, as reported in 18 Sol. J. 470, a more concise and methodical report than is to be found in 2 O'M & H. 77. That learned Judge is dealing with irregularities under a section identical in terms with our section 197, in which the same words are also found.

In the *Hackney Case* nearly 5,000 voters had been absolutely, and many others partially disfranchised by the failure to open some of the polling booths. The judge said he had to see whether the irregularities complained of affected the result of the election—in other words, to determine whether they were such as fairly and substantially to bear upon the result. He could not possibly say whether the result would have been changed or altered if circumstances had been different; but he held that what had occurred had an important and a substantial bearing upon the result, and that that result might have been different if facilities had been afforded for the whole of the electors to poll.

The object of the section, as he read it, was that an election, otherwise unexceptionable, should not be avoided for a mere informality or triviality, but only for such substantial irregularity or irregularities as might reasonably and fairly have affected the result.

The scope of section 159 appears to be that for one or two or even three acts of illegality of trifling nature or of trifling extent, an election should not be set aside when the majority is very considerably more than the votes affected, unless other illegal practices (whether in the respondent's interest or generally), are made to appear so influential, or so extensive, or so insidious, as to induce the

probable and reasonable belief that but for these acts and practices the result might have been different.

That seems to me to be the proper interpretation of this somewhat puzzling section as applicable to the case in hand; and if the effect is (as was argued) to lessen the safeguards of electoral purity, then that is a matter for the consideration of those legislators whose business it is to change or restrict the law which I am simply called upon to construe and administer.

After much and anxious consideration, my conclusion is, that to such a case as the present this section was intended to apply.

The acts are of such unimportant extent as not to have affected the result, either alone or taken in connection with other proved or fairly inferable illegal practices, nor can they, in my judgment, be reasonably supposed to have done so.

As to costs, under section 100, the petitioner should get his costs of the petition and trial, save as to so much as related to the irregularities of the returning officer and his subordinates; and as to these all parties should bear their own costs (*Athlone Case*, 2 O'M. & H. 186, 190; *Drogheda Case*, ib. 201, 211; *Wigtown Case*, ib. 215, 230.)

I find further that the following persons have been guilty of corrupt practices: W. M. Harvie, John Thornton, Daniel Regan, Patrick Finn, and Jeremiah Osser.

And that there is no reason to believe that corrupt practices have extensively prevailed at this election.

CAMERON, J.—Dealing with the questions of irregularity presented by the petition, I shall consider them in the order of their importance. The gravest is the neglect of the returning officer to open the election on the nomination day between the hours of 11 a.m. and 2 p.m.

Upon the evidence it does not appear that the delay of an hour and ten minutes, which occurred between the time fixed by the returning officer's proclamation for the opening of the election and the actual opening in any man-

ner interfered with or prevented the nomination of any candidate.

If, therefore, the objection is a fatal one, it must be because the returning officer's proceedings were wholly unauthorized and void; and the contention of the petitioner's counsel goes this length.

In determining the question regard can only be had to the provisions of the Election Act of Ontario, as it is only under that the elections are held and the proceedings for holding them pointed out and directed.

The provisions of the Act must be construed and interpreted according to the ordinary rules which guide courts in the construing and interpretation of statutes.

By sec. 26 of the Act, whenever a general election is to be held the Lieutenant-Governor in Council fixes the day for holding the election, which is called the Nomination Day, and the day on which the poll takes place, if a poll becomes necessary.

By sec. 27 the day fixed "shall not be more than twenty days nor less than sixteen days from the date of the writs of election; and the day for holding the polls shall not be more than eight, nor less than six days after the day for holding the said elections."

By sec. 28 it is provided that at every general election, the elections shall all take place on the same day; and the days for holding the election and opening the polls shall be stated and inserted in the proclamation calling such general election and in the several writs of election in that behalf.

By sec. 48 the returning officer is required, at the time and place fixed for opening the election, to proceed to the hustings and make proclamation in the specified form, and shall require the electors then present to name the person they wish to choose at the election to represent them, in obedience to the writ of election.

All these provisions are imperative, giving to the word "shall" the force assigned to it by the Interpretation Act, R. S. O. ch. 1 sec. 8, sub-sec. 2; and I presume if the Gover-

nor in Council should fix a day for holding an election, less than sixteen days from the date of the writ of election, an election held on the day so fixed would be void.

No question of prerogative arises, for under secs. 84 and 92 of the British North America Act the Legislature has power to legislate in respect to the constitution, elections, the powers and duties of returning officers, &c., and everything relating to the constitution of the Province, except the office of Lieutenant-Governor. Therefore the Lieutenant Governor in Council must conform to the rules laid down by an Act of the Legislature, and cannot disregard its positive requirements any more than any other person or officer named in it.

If sect. 26 had required the Lieutenant-Governor in Council to fix the time for holding the election between particular hours of a particular day, I can see no good reason why the day should not be disregarded as well as the hours, and to disregard the more precise and limited portion of the day would seem to be even more objectionable than to disregard the whole day as the precise limitation would be more likely to induce the electors to think if the proceedings did not take place at the time specially indicated and limited, they would not take place at all.

If the Governor in Council, then, cannot select a time for holding the election outside of the limits prescribed by the statutes, it is difficult to see how a returning officer can do so, where statutory requirement is as clear and positive as in this case.

By sec. 32 he is required to issue a proclamation in a prescribed form, declaring therein "the place, day and hour, at which the election will be held, and shall cause the proclamation to be posted" as directed by the Act "at least eight days before the day fixed for holding the election," called the nomination day.

By sec. 33 it is declared again: "the place at which the election will be held shall be fixed by the returning officer, and shall be in the public place most central and most convenient for the great body of the electors in the electoral

district for which he is acting, and the hour to be fixed shall be between eleven o'clock in the forenoon and two o'clock in the afternoon of the day so fixed for opening the election."

I do not suppose it can be successfully contended that if the returning officer named one place in his proclamation and opened the election at another, that the election could be held to be valid, although no more inconvenience was occasioned thereby than has been shewn to have occurred in this case, that is to say, none at all. If he could not disregard the directions of the Act in the one case, how can he in the other? What is there to guide the Court in arriving at the conclusion that the provision as to place is imperative, while that as to time is merely directory?

The policy of the Legislature in requiring all elections to be held on the same day, was to prevent the possible influence that the result of one election might have upon another, and to restrain outside interference as much as possible in the conduct of elections, without denying an elector in terms the right of voting wherever he was qualified to vote. The Legislature may therefore in its wisdom, have thought such influence and interference would be better guarded against by limiting the time within which the election should be opened to the specified hours, as rendering it more difficult for any one to take part in two elections. To hold the requirements, then, of section 33 to be merely directory and not imperative, is to substitute the discretion of the Returning Officer in the first place for the positive provision of the statute; and in the next, to support the exercise of such discretion by a judicial interpretation directly at variance with the language used.

I am quite aware that in the construing of statutes, courts have held language, imperative in terms, to be only directory; but then there must be within the four corners of the Act internal evidence that the imperative words were intended as a direction, and not as an indication of an essential requirement of the design to be carried into effect, to warrant their being so construed.

I am unable to find in this Act such indication. The Returning Officer receives his appointment through the writ of election, but his duty is prescribed by the Act and solely by the Act.

There are only two cases in which he may hold an election on a day or time different from that mentioned in his proclamation, that is, under sec. 54, where a candidate dies between his nomination and the close of the poll, and under sec. 8 of 42 Vic. ch. 4, (O.) which provides: in cases where, from unforeseen delays, accident or otherwise, the proclamation for holding an election could not be posted up so as to leave the required delay between the posting up of the proclamation and the nomination day appointed by the Lieutenant Governor or the Returning Officer, the Returning Officer may fix new days for the nomination of candidates and for the polling.

These are the only provisions relating to the fixing of the nomination day.

By sec. 197 it is provided: "No election shall be declared invalid by reason of a failure to hold a poll at any place appointed for holding a poll, or by reason of a non-compliance with the rules contained in this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules of this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principle laid down in this Act, and that such failure, non-compliance or mistake did not affect the result of the election."

This is an express provision to prevent certain miscarriages from having the effect of invalidating the election; and under the rule of construction *expressio unius est exclusio alterius* other irregularities than those specially indicated are not within the saving, and are to be treated upon their own merits or demerits; and, if the irregularity is in an essential matter, the court must yield to it, though in fact no one has been prejudiced by it.

In this case it cannot be affirmed with positive certainty that no other nomination would have been made if the election had been opened at the hour appointed.

There is no reason to believe that any other candidate would have been proposed; but as all the electors had the right to expect that the election would have been begun at the hour appointed—and we must assume that they knew such commencement was required to take place under the statute not later than two—I am of opinion the Court is not at liberty to speculate as to whether there would or would not have been other nominations—whether the irregularities provided for by section 197 could affect the result could be ascertained with sufficient certainty; that is, could be determined beyond a peradventure by the voters' list, whether the entire votes given against the elected candidate would change his majority into a minority. If it would not, the omission to open the poll, the failure to take the poll or to count the vote, or an error committed in the use of the wrong form, would be of no consequence. But if the voters on the list would be sufficient to change the majority, no evidence or speculation as to the way they would have voted, would be permitted to save the election. It would be set aside.

I had hoped to find some more direct authority than any cited on the argument, but I have not been successful in meeting with any that exactly covers this case. At the time fixed for holding the election the Returning Officer was not at the place fixed. It is doubtful on the evidence whether he was even within the electoral district. He was, without culpable default on his part, unable to reach the place till two o'clock, an hour after the time appointed, and so he could not be said at the time and place fixed to have been proceeding to the hustings.

The statute contemplates the Returning Officer being at the place—by which I understand the village, township, town or city in which the hustings are erected—and, being in such place, shall, at the hour appointed, proceed to the hustings and open the election immediately,

In reference to the necessity of holding an election at the place indicated, I find an authority under the Municipal Corporations Act, which is much against holding this election valid. It is a decision by the late Chief Justice Draper, in Chambers : *Regina ex. rel. Preston v. Preston*, 2 Cham. R. 178. The election by the by-law of the municipality was to be held at the place of one Robert Gillis. It so happened that the dividing line between two of the wards in the municipality ran through the farm of the said Gillis, his house being in one ward and his barn in the other. The election was held at the house, which was not in the ward for which the election was being held. The relator was the defeated candidate. He objected to the place, and the Returning Officer proposed to go to the barn and hold the election there, but he was not further urged, and the relator in reply to a question put to him by the Returning Officer, said if he had been elected he would have considered himself duly elected. The learned Chief Justice held, as the statute required the election to be held in the ward, it was void; and the relator had not precluded himself from disputing the validity of the election by acquiescing in the proceedings going on at the house. There was no pretence that any one was misled by the election having been so held.

In *Regina ex. rel. Allemaing v. Zoeger*, 1 P. R. 219, Sullivan, J., in Chambers, held that an election holden at a place appointed by resolution of the council was void, as the Statute 12 Vic. ch. 81, sec. 5, required the council to fix the place for holding the election by by-law; and sec. 9, while it authorized the council to change the place originally fixed, the change was required to be made by by-law. The election was set aside, with costs.

In this case the relator did not appear to have interfered with the election.

The report of these cases does not show that the decisions were based upon any direct authority. They seem to have been based upon the view that an election held differently from the mode indicated by the statute could not be sustained.

In the *King v. Langhorn*, 4 A. & E. 538, the defendant was elected Mayor of Berwick-upon-Tweed ; and on a *quo warranto* information for his removal, it appeared that no particular day was set by charter or custom for the election of burgesses, but that previously to meetings for that purpose notice was given by ringing a bell three times, namely, for a quarter of an hour, two hours before the guild was held ; again for a quarter of an hour, an hour and a half before the guild, and again at the time appointed for the meeting of the guild, the bell being loud enough to be heard all over the borough, and by the sergeant-at-mace giving notice personally to the resident burgesses, or leaving word at their places of residence of the intended meeting, and if required, of the purpose for which it was to be held. Two resident burgesses of the names of Robertson, a fisherman, and Mace, did not receive such notice, and did not attend. The sergeant-at-mace gave evidence that Robertson had several times before the meeting told him not to summon him, as he was frequently out at sea, and he could hear tell of what was going on ; and he had omitted to serve Mace accidentally. The jury found the custom was as pleaded, to give notice of the meetings of the burgesses in the manner mentioned ; but that the custom was to be taken with the qualification, that it was not violated by an accidental omission to serve the notice upon any individual burgess, and the omission in the case of Robertson and Mace was accidental. The jury's finding was taken as a special finding ; and leave was given to the Crown to move the Court to enter a verdict for the Crown thereon.

Lord Denman, C. J., in delivering judgment said, at p. 545 : " The jury give their opinion that the custom stated ought to be received with the qualification, that an omission by accident does not invalidate ; that is, that a custom to summon all, means a custom to summon, all subject to accident. If so, the verdict ought to stand for the defendant. But I think that that is not so ; and that an accidental omission does not excuse the officer. If it did, I fear that accidental omissions would soon become intentional ones.

Besides this, one omission was not accidental. It was made, merely because the burgess told the officer not to summon him, as he was generally away from home. It is clear from authority and principle that this furnished no excuse for the officer omitting to summon the burgess. The reason has been properly assigned at the bar, namely, that attendance was a public duty on the part of the burgess; and this was admitted, on the other side, to be true in the case of a select body; but it was argued that, in the case of an indefinite body, the rule was different. That is a distinction to which I cannot assent. The public have the right to the security arising from the service of notice; and nothing but actual impossibility will cure the omission. I come to this conclusion with great regret, because much inconvenience may be produced with respect to titles affected by the omission. This, however, must always follow where a party is unduly placed in office. And, on the other hand, the conclusion of law to which I come, gets rid of the examination into motives, and simply lays down the clear and intelligible duty of summoning all the electors, so as to exclude the possibility of an unfair advantage being taken."

The absence of Mace and Robertson, it is not stated, made any difference in the result of the election; and upon authority, apart from special statutory provision, whether it would or would not, is a matter with which the Court may not concern itself.

In *Rex v. May*, 5 Burr. 2681, it was held that an election of a burgess was invalid, though all the electors had personal notice of the meeting and its object, and all except two were present and were unanimous, by reason of the election not having taken place at the guild hall, the usual place, and the usual summons that of ringing a bell was not given.

Lord Mansfield said, at p. 2683: "Nothing is more certain, than that there cannot exist a valid election, upon a by-day, by surprise. Notice must be given to every member who is within the limits of summons. In *Corbet Kynaston's Case*

only one member was unsummoned. And personal summons must allow reasonable time to the person summoned. But this is only where no other method of summons or notice is established; as for instance, by bell, a horn, &c. Here, by the usage, the notice must be given by personal summons to those who are within the limits of the borough. But that is only part of the usual notice. There must also be a bell rung at 8 and 9, and then to toll from ten to the time of meeting. This can't be dispensed with: it is necessary to be complied with, unless every single member be present, and consents to waive it. The want of it vacates the election."

Of course there is no pretence for holding that the positive requirements of an Act of the Legislature are not of as much force as those presented by custom. To hold an election at a different time from that fixed by the statute is as much upon a by-day as if it were held upon a different day; and, unless all the electors, according to these authorities, are present and waive the irregularity, the election must be held invalid.

As I have already said, it is impossible to say that no elector attended at the proper time with the view of being a candidate himself, or of nominating some one else. As between the two candidates the contest was carried on as it would have been had the nomination not been delayed beyond the time at which it could be properly and regularly made. The custom that requires notice of an election to some corporate office to be given in a particular way is no more imperative than the statute in this case; and, if the manner of giving the notice in the former case cannot be treated as directory, I fail upon analogy to see how the hour in the latter can be.

Under the Imperial Act 35 & 36 Vic. ch. 33, the difficulty here presented would be minimized, for by the 13th section any irregularity of this kind is covered. That clause extends to all irregularities and informalities, while the provision made by our 197th section is limited to the errors or mistakes therein indicated.

* The language of Mr. Justice Grove in the *Hackney Case*, 2 O'M. & H., at p. 85, setting forth what the object of the Legislature was in enacting that clause, impliedly at least shows that in that learned Judge's opinion, in the absence of such a provision, how formidable the objection here presented would appear.

He said: "If I look to the whole, and to the sense of it as a whole, it seems to me the object of the Legislature in this provision is to say this—an election is not to be upset for an informality or for a triviality, it is not to be upset because the clerk of one of the polling stations was five minutes too late, or because some of the polling papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated to really affect the result of the election. I think that that is the way of viewing it which is consistent with the terms of the section. So far as it seems to me, the reasonable and fair meaning of the section is to prevent an election from becoming void by trifling objections on the ground of an informality, because the judge has to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election."

From this language the inference would seem to be irresistible that the learned Judge, were it not for the saving clause, would deem the non-observance of a positive requirement of the Act by the Returning Officer a ground for avoiding the election.

In the *Rye Case*, before a Parliamentary committee, reported in 1 P. R. & D. 112, the respondent, who was elected without opposition, admitted that he could not retain his seat, the Returning Officer having only given notice on the 20th December, of the holding of an election on the 23rd December, the statute under which the election was held 3 & 4 Vic. ch. 81, requiring that three clear days notice of the election should be given. The committee declared the election void.

In the *Longford Case*, 2 O'M. & H. 8, Fitzgerald, J., expressed a view adverse to some extent to this. But it was an observation made before argument and not intended as a decision, or as based upon a consideration of the question. The point, however, was a narrower one than here, as no one could be misled. It was that the Returning Officer had not made his proclamation within two days after the receipt by him of the writ of election. The statute, 1 Geo. IV. ch. 11, sec 5, required the sheriff immediately after the receipt of the writ to endorse the date of receiving the same, and within two days to cause proclamation of the time and place of holding the election to be made.

The sheriff received the writ on Friday, 24th December, but did not make proclamation until Monday, the 27th December.

Mr. Justice Fitzgerald stated his opinion was adverse to the contention as to the election being void; but, if necessary, he would call upon counsel on the other side to answer it. The election was declared void on other grounds, and the point was not decided.

In England there is no Interpretation Act similar to ours, and none that gives any special force to the word "shall."

The cases in England thus are not absolute guides to us in determining when the requirement of a statute is merely directory, and when imperative.

The 7th section of the Interpretation Act declares that every provision of the Act shall apply to the Revised Statutes, and to every Act thereafter, except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression, or clause is inconsistent with the context—and except in so far as any provision thereof is in any such Act declared not applicable thereto.

The 8th section declares the word "shall" shall be construed as imperative.

But this does not solve the difficulty entirely. The question still remains; what is the consequence of the Returning Officer neglecting to observe a direction of the statute? that

is unquestionably imperative as far as he is concerned ; a reference to English authority does not lead to a satisfactory result.

There is a mass of decisions ; but it is difficult to extract a clear and definite rule from them.

I cannot do better than to refer to the language of Lord Penzance in *Howard v. Bodington*, 2 P. D. 203, at p. 211, as illustrating the want of certainty. After noticing the reference of counsel to *Maxwell* on Statutes, and the cases quoted therefrom, he thus expressed the result : " Since the matter was argued I have been very carefully through the cases, but upon reading them all, the conclusion at which I am constrained to arrive is, that you cannot glean a great deal that is very decisive from a perusal of those cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion, which was expressed by Lord Campbell, in the case of the *Liverpool Borough Bank v. Turner*, 2 DeG.F. & J. 502 : * * ' No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only, or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be considered.' " Lord Penzance adds : " I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter ; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act ; and upon a review of the case in that aspect decide whether the matter is what is called imperative, or only directory."

As to the effect of the non-observance of the requirement, the same learned lord, in the same case, at p. 210, thus states his opinion : " Now the distinction between matters that are directory and matters that are imperative, is well known to us all in the common language of the

Courts at Westminster. * * The real question in all these cases is this : A thing has been ordered by the Legislature to be done. What is the consequence if it is not done ? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail."

If, in the face of the Interpretation Act, the Court would be at liberty to say the requirement of the Election Act, that the time for the nomination or opening of the election, shall be fixed between the hours of 11 and 2, is only directory, the difficulty is in seeing what there is in the provisions of the Act that would make that provision less imperative than any of the others in giving effect to the object of the Legislature.

The necessity of observing strictly the requirements of an Act of Parliament is very clearly exemplified by the decision in the case of *Noseworthy v. Buckland-in-the-Moor*, L. R. 9 C. P. 233.

At the trial of the petition, and on the argument, I felt very strongly that the error of the Returning Officer in not opening the election between the defined hours pursuant to his proclamation, and the requirement of the Election Act, ought not to avoid the election.

But upon further consideration, and after an examination of many authorities, including that of *Rex v. Poole*, *Cas. temp. Hardwicke*, 27, 28, wherein Lord Hardwicke held the mention of hours in the statute, then under consideration, was only directory and not restrictive, I am unable to retain the opinion then formed. Here the requirement, as to time, is made by the Interpretation Act imperative ; and it is impossible to say that no one was affected by the election having been opened more than an hour after the appointed time, and outside of the time expressly limited for such opening.

The decisions of election committees in this country, I need hardly say, are not authorities binding upon Election Courts, especially where they are at variance with English decisions.

The case of *Re Miles and Corporation of Richmond*, 28 U. C. R. 333, has much analogy to the present case. It was the case of an application to quash a by-law under the Canada Temperance Act, 1864. The 5th section of the Act required the clerk of the municipality to give notice in some newspaper for four consecutive weeks, that on a named day in the next week, after the four weeks, at the hour of ten in the forenoon, a meeting of the electors would be held for taking a poll. The first notice published fixed the hour at two in the afternoon. The subsequent notices corrected the mistake and made the hour ten. Unless the first notice could be counted, the day of meeting was too soon. The Court held such notice could not be counted, briefly observing it could not be taken as a good notice, "as the statute requires the notice to be for the hour of ten o'clock in the forenoon, and not two in the afternoon." The by-law was quashed.

Misconduct on the nomination day may avoid an election subsequently properly conducted according to the expressed opinion of Mr. Justice Keating in the *Norwich Case*, 2 O. M. & H. 42, where he says: "If it were proved that a candidate or his agent hired men to attend the nomination, and to hold up their hands on the occasion, my impression decidedly is that it would be illegal, and would avoid the election," showing that an act that could prejudice the result committed on that occasion, may still avoid the election.

Upon this point the only remaining consideration is, is the petitioner estopped from raising the objection? I do not think he is. Assuming that he was present at the nomination—which I think very doubtful from his description of what took place, it being very probable that he is confounding a political meeting with the nomination—he did nothing at such nomination; and I know no rule of law

that required him to become active and protest against the proceedings. Had he nominated or seconded the nomination of a candidate, it would have been different, perhaps; but even that, according to the decision of Chief Justice Draper in the *Queen ex rel. Preston v. Preston*, 2 Cham. R. 178, might not have had that effect.

I am of opinion, then, that the election should be set aside on this ground; but as the returning officer was not wilfully nor negligently misconducting himself, and the delay in opening the election may reasonably be regarded, as far as he is concerned, as the result of unavoidable accident, if it were to be vacated on this ground alone, it should be on the terms that all the parties should bear their own costs.

Upon the first and second grounds of irregularity, I am of opinion that they did not *per se* affect the result, and therefore are within the protection of clause 197, which prevents such irregularities avoiding the election where the result is not affected thereby.

I am of opinion, on what may be termed the meritorious grounds presented by the petition and particulars, the election should be avoided.

I think it was clearly established that William M. Harvie, an agent of the respondent, was guilty of several corrupt practices: that he gave to John Thornton the sum of \$4 to induce him to vote for the respondent. The fact of the giving of the \$4 was not disputed, but was put by Harvie as a loan, and not for the purpose of inducing Thornton to vote.

If this shallow pretext should be allowed to prevail, under the circumstances detailed in evidence, the enactments against bribery at elections would be but idle and useless words, quite incapable of preventing this particular species of corrupt practice. The bribery by him of Daniel Regan was equally clearly made out. The statement made to Regan by Harvie, when the former wanted him to buy his vote, that if he would declare upon his honour that it had nothing to do with his vote, he would give him the

\$5 to pay his taxes, was altogether too thin a veil to conceal the true and corrupt nature of the transaction. The treating of Regan on polling day, within polling hours, too, was made out so as to make that a corrupt act, though it was not charged in the particulars. The hiring by Harvie of Timothy Connor's team to take voters to the poll on polling day, was also proved, I think, beyond reasonable doubt. I think it was also proved that Patrick Finn, a licensed tavern keeper, did, within polling hours, at his tavern in the town of Orillia, give liquor to persons therein: that William M. Harvie was one of the persons to whom such liquor was given; and I think there was evidence sufficient to establish, in the absence of the evidence of Finn himself to contradict it, that he was an agent of the respondent. The respondent was the candidate nominated by the Reform Association for the riding, at a meeting of the association for the purpose, called by public advertisement. He attended, and though it was not shown that he moved any resolution, or did anything actively at that meeting, he was a member of the association, and generally took part in elections on behalf of the Reform candidates, and he was on the polling day taking voters to the poll.

Mr. Robinson, the President of the Reform Association, was called to prove that he did not think Finn worked: that he was a friend of Thompson's and promised him not to work, as he understood; and Mr. Harvie gave his opinion, that he was not working on their side before or on polling day. The evidence of agency is not certainly very strong, but as Finn was a member of the Reform Association upon whom the respondent relied for assistance and support, I think, in the absence of any statement from Finn himself, that he was not supporting the candidate of the association as usual, it is doing no violence to the law of agency to hold it to be made out in this case. I do not think that charges numbers 22 and 23 as laid in the particulars are made out.

Charge 22 is that Jesse S. Peckham, the younger, Henry L. Lovering, and James Scott, agents of the respondent,

practised intimidation upon one Allan E. Clarkson, by threatening him with dismissal from the employment of the Georgian Bay Lumber Company, in order to induce or compel him to vote for the respondent, or to refrain from voting against the respondent.

The evidence shews that Clarkson was not in the employment of the lumber company, but occupied a house of theirs rent free, and was paid for boarding the men by the men themselves, but through the company by the latter retaining out of the men's wages the amount of their board for Clarkson: that he had voted before anything was said to him on the subject: that he was acting as agent or scrutineer for the defeated candidate, and while so acting he was sent for by Mr. Peckham, the manager of the company, and was given to understand his so acting for Mr. Thompson was unsatisfactory to him and against the interests of the company. No threat of any kind was then made, and, though Clarkson returned to the polling booth intending to continue to act as scrutineer, on reflecting on what had been said to him, he thought it might be better for him to cease to so act, and he did some time before twelve o'clock. It appeared that he had been canvassing the men at the boarding house for Thompson, and some of them had promised him to vote for Thompson, and he thought a good many of those who had so promised voted before he left the polling booth. At the time the conversation took place between him and Peckham, the latter knew he had voted and that he was acting as scrutineer.

The charge, therefore, as presented was not made out.

The charge, as laid in paragraph 23 of the particulars, was that Mr. Peckham and the two other persons named, did dismiss the said Clarkson from the employment of the company on account of his having voted at the election. The evidence was to the effect just mentioned in connection with charge 22, that Mr. Peckham had remonstrated with Clarkson for taking an interest on the Conservative side, and said that any of the men voting

that way were voting against the policy of the company, and were taking the bread out of their own mouths. The witness Clarkson was unable to say whether it was "our" or "their" mouths that he said.

After this, on or about the 16th March, Clarkson received a notice to give up the boarding house.

The notice was in writing as follows :

"WAUBAUSHENE, March 16th, 1883.

"MR. A. E. CLARKSON, Waubauskene.

"Dear Sir,—I beg to inform you that we require from you, within thirty days from this date, possession of the house and premises at Waubauskene now occupied by you and belonging to us. This is to give you thirty days' notice, that you may have an opportunity of making any such arrangements as you may deem necessary for quitting the premises within the time named.

"Yours truly,

"THE GEORGIAN BAY LUMBER CO.

"J. SCOTT, Sec. and Treas'r."

After receiving this notice Clarkson went to see Mr. Peckham, and asked him why he had given him such notice; Mr. Peckham replied, "For shooting off your mouth so much in the elections."

It appeared that Clarkson had been talking of someone in connection with the company sending one of the hands away to prevent his voting, and Mr. Peckham assigned this talk as the reason for his dismissal.

The evidence, though it may not remove the impression that Clarkson's conduct at the election formed at least a part of the ground for his dismissal, does not make it clear beyond reasonable doubt that he was dismissed on account of his having voted at the election; and the charge must, therefore, be deemed not proved.

There was only one other corrupt practice proved. That was the keeping open of his tavern by Jeremiah Osser, who was not shewn to be an agent of the respondent. The evidence relating to the hiring of the teams of McKinlay,

the livery stable keeper, does not come up to proof of an actual hiring, though it approaches dangerously near to it.

I think if there had been no question as to an election concerned, if a jury on the same evidence had held the committee liable on action brought by McKinlay to recover for the bill, the Court would not have disturbed their verdict; but the evidence in this case should not stop short of proof of an actual hiring, and should not be allowed to rest on circumstances open to either construction, that the teams were hired or volunteered and accepted as volunteers without the parties intending that the owner should receive any compensation. The practice of volunteering teams by livery stable keepers is reprehensible, especially when their teams have been hired by candidates or their agents for what may be legitimate purposes before the polling day.

It is very difficult to say that such volunteering may not be the consequence of such previous hiring, and the hiring may be ample reward for the legitimate use made of the teams as well as their improper use on the polling day.

The respondent is entitled to the benefit of the doubt; and I am disposed to give it to him.

It remains to be considered what is the proper result of the corrupt practices proved.

If section 159 had not been enacted, the election must have been avoided. That section, in my judgment, as well as being exceedingly embarrassing, is pernicious in its effect, and calculated to open the door to a good deal of corruption in the conduct of elections. The object of the clause is stated in it to be to "prevent the expense and trouble of new elections when unnecessary and useless." What is meant by "unnecessary and useless?" Does this provision simply mean that an election should not be avoided where the Court is satisfied the result would be the same as indicated by the respondent's majority and the number of tainted votes; or can the Court take a wider range of reflection in considering whether the result would be the same or not? The result might be different on account of a change in the political sentiment of the

electors, owing to some real or supposed objectionable policy of the Government or Opposition—a change in the constitution of the executive or in the leadership of the Opposition. With such considerations the Courts ought to have no concern, and the Legislature could not have meant them to have any. Then is the satisfaction to depend upon the view the Court might take of what the result would have been if the corrupt practices had not been committed? And if such result would have been favourable to the respondent he ought not to be harassed by the necessity of undergoing the second contest.

The 159th section does not in terms go this length. It makes it necessary for the Courts to determine, from the quality and extent of the corrupt practices, whether not only that the election has been “affected,” but also whether it may be “reasonably supposed to have been affected” by such corrupt “act or acts,” not alone “but in connection with other illegal practices.” Illegal practices are, I assume, practices prohibited by the Election Act, but not made in terms corrupt practices, such as, if committed by the respondent himself, would avoid the election, though only one isolated case was established against him.

I find the utmost difficulty in putting a construction upon the expression “of a trifling nature, or of trifling extent,” without adopting an interpretation calculated to make the Act for the prevention of corrupt practices at elections virtually so much waste paper, or by giving narrower construction to the latter words “of trifling extent,” than it may have been intended they should receive. Where a candidate has only a majority of five and only one corrupt act, say of deliberate bribery by an agent, is proved, that would not affect the result, if that is to be determined by striking off the corrupt vote. The act in itself would not be trifling in its nature, for no deliberate act of bribery can be so designated; but the evidence going no further than to show that one vote was affected, it might be called trifling in its extent, if that can relate to that which is not trifling in its nature and should

not be restricted in its application to things trifling in their nature and extent both, and the removal of the corrupt vote would leave the result exactly as it was before, if the function of the Court is simply to take the scrutiny limited in its extent and operation by the corrupt act actually proved.

The clause must be read in connection with that which precedes it. Section 158 by itself would require the Court to avoid an election on proof of one corrupt practice gross or trivial; and read in that connection, if the act proved is not in its quality of a trifling nature, it will still avoid the election unless it appears affirmatively that the act is confined and limited in its operation, so to speak, to itself, and could have no influence beyond.

To illustrate: suppose a poor, poverty-stricken elector, without influence, is paid \$5 for his vote, the effect could not reasonably be supposed to extend beyond the one vote. But suppose the \$5 were paid to a farmer with five sons all qualified to vote in respect of his farm, could the payment in its influence be limited to the farmer's own vote; or, in the case of an influential man with a number of electors in his employ, be paid \$100, could it be said reasonably the result might not be affected, though the payment actually was for only the one vote, and the influence of the party bribed, although it did not appear that he used any influence, or it was shewn affirmatively that he did not use any influence, could it be held that it could not reasonably be supposed to have affected the results or suppose that the agent paying the \$5 is a very active and influential person in the election, can his act be regarded in the same light as that of one, who taking no active part except that of voting, finds his neighbour willing to vote on the same side if he is paid for his day, and pays him?

In the one case there can be no reasonable certainty that a number of corrupt acts of a like character may not have been committed, though the agent may swear that he has not committed other acts; and in the other the probability is the act is isolated.

If the corrupt acts, taken in connection with any other illegal practices that may have prevailed, cannot reasonably be supposed to affect the result, the Court is bound not to avoid the election, because the word "shall" in the sentence "such corrupt act or acts shall not avoid the election," is as imperative upon the Court, determining its duty and obligation, as it is in prescribing and defining the course to be pursued by the returning officer in opening and conducting the election.

The quality of the act being essentially bad, the extent of its influence is not to be measured or estimated merely by the number of votes actually proved to have been tainted thereby, but is to be regarded and estimated in connection with the influence of the party proved to be guilty of its commission, and by the opportunities he may have had of resorting to like practices in other cases.

I think I am bound to hold in giving a just interpretation to sections 158 and 159, when it is established that a recognized, important, and influential agent is proved to have committed one or more deliberate acts of bribery, the candidate cannot retain his seat though the votes shewn to have been affected thereby might be struck off without putting the candidate in a minority. In the present case the respondent was the candidate of the Reform Association. He in one sense, in the management of the election, was more their agent than their principal, and Mr. Harvie, the secretary of the association, was, according to the evidence, one of the most active members of the organization, the counsellor and referee, so to speak, of the President. To permit, therefore, corrupt practices committed by him, to have less force than if they had been committed by the candidate himself upon the election, would be establishing a most dangerous precedent, which, if it must be established, its creation will be a duty devolving upon those who have a right to review and overrule my judgment.

I am of opinion that the conduct of Mr. Peckham in remonstrating with Clarkson in the manner he did, and

thereby inducing him to abandon the position in which he was acting for Mr. Thompson, the respondent's opponent, was exceedingly reprehensible; and his actions may have had considerable influence and a deterrent effect upon other employees of the Georgian Bay Lumber Co., as well as depriving Mr. Thompson of what, under the circumstances, was valuable aid and assistance.

I have no doubt either that he should be held to be an agent of the respondent.

The evidence shews that the respondent sought his influence and support, and it was promised to him. He also wished him to preside as chairman of the meeting held by the respondent at Waubauskene. Mr. Peckham declined the honor of acting as chairman, on the ground that he was an American citizen, and not a British subject. He sent one or two of his men with the respondent to introduce him to the other men. The electors of that section were chiefly the managers and men employed by the company. I think, therefore, that as the respondent sought the influence of Mr. Peckham, he should be held responsible for the way in which it was used, and that it is to be regretted the modesty displayed by Mr. Peckham in declining for the reason he gave, which by the way was a most just and forcible one, to act in the comparatively harmless position of chairman, was not followed up by decent and becoming non-interference in the election and in the politics of a country to which he owed no allegiance and acknowledged none.

Though I have held that the specific charges relating to Mr. Peckham were not made out, I make these remarks in consequence of the observation of Mr. Justice Manisty in the *Lichfield Case*, 3 O'M. & H. 138, on the conduct of an influential gentleman of the name of Hinchly, which was, it appears to me, less a direct and improper interference with the freedom of the electors, than the conduct of Mr. Peckham in the present case.

On the whole case I am of opinion the election must be set aside, and that the petitioner is entitled to the general costs, not including those relating to the irregularities com-

mitted by the Returning Officer and by the deputy returning officer in Tiny, as to which, each party must bear his own costs.

I concur in the opinion of my learned brother, the Chancellor, that William M. Harvie, John Thornton, Daniel Regan, Patrick Finn, and Jeremiah Osser, were guilty of corrupt practices committed at the election; but, in the face of the fact that one of the chief executive officers of the Reform Association was proved to have been guilty of several corrupt practices, I am not able to say that corrupt practices may not have more extensively prevailed; while I have no reason to think they prevailed to an extent to disentitle the district to the right of representation.

From these judgments an appeal was had to the Court of Appeal, and was argued on October 31st, 1884.

November 11, 1886. HAGARTY, C. J. O.—I do not propose to question any of the findings on which the two learned Judges have agreed in reporting. They agree that Harvie, an agent of respondent, was guilty of bribing John Thornton to induce him to vote for respondent, and of bribing Daniel Regan for the same purpose, and of hiring a team on polling day from one Connor. They also find that Finn, a licensed tavern keeper, did during polling hours give liquor to said Harvie and another. They differ as to Finn being an agent. Boyd, C., decided that the election ought not to be avoided under the saving provisions of sec. 159. Cameron, J., held that it should be avoided.

Section 159 reads, "To prevent the expense and trouble of new elections, when unnecessary and useless, in case of a corrupt act or acts being committed by an agent without the knowledge and consent of the candidate, if the corrupt act or acts was or were of such trifling nature, or was or were of such trifling extent *that the result cannot have been affected or be reasonably supposed to have been affected* by such act or acts, either alone or in connection with other

illegal practices at the election, such corrupt act or acts should not avoid the election."

This election was very close, over 2700 votes polled and the majority about 23.

Robinson and Harvie, one the president, and the other the secretary of the Reform Association, seem to have been the principal agents and managers of the canvassing and organization of the proceedings on respondent's part. Mr. Robinson in his evidence states this very fully. He states that Harvie and he did the work of the election; Harvie's own evidence is very full and clear in all this.

Mr. Harvie's account of the bribing of Daniel Regan, may be referred to. Regan came to him and promised him to get the support of his father and three brothers for \$15 or \$20. He was aware that Regan had the reputation of selling his vote, as also some of the other Regans, and Harvie had previously asked him to vote for respondent. To this man he lends \$5, declaring and agreeing, as he says, that it was only a loan. Soon after this, Thornton comes, Regan with him. Thornton asked for \$20, for himself, his father, and brothers. After taking his "word of honour" that it would not influence his vote, Harvie lent him \$4. Thornton swore that Harvie suggested the loan instead of the direct bribe. Harvie claims that it was his suggestion. He came to Harvie on account of what Regan told him of his loan.

These transactions were, of course, found by the learned Judges to be clear cases of bribery.

Mr. Harvie is also found to have illegally hired a team. He also admits his drinking in polling hours, in Finn's tavern. On the polling day Mr. Regan manifested some backwardness in going to the poll; and one Ramsay, in Regan's presence, applied to Harvie to get Regan drunk. Harvie then went to a druggists and got a small bottle of drink carefully wrapped up, which he gave to Ramsay for Regan.

We thus find this most active agent convicted of three distinctly illegal acts, two of them involving the moral

turpitude of bribery. We also find him violating or assisting in violating the law in the other cases mentioned. On the evidence he appears as the principal figure in all this election struggle ; and we have now to consider whether on the evidence before us we can give the respondent the benefit of this 159th section.

I have read with much attention both the opinions on this head. I have much respect for the diligence and learning of both the learned Judges ; and I try to weigh, as they deserve, the reasons and arguments advanced by each.

I am compelled to say that my judgment fully concurs in the result arrived at by Chief Justice Cameron. I need not repeat his reasons. I am wholly unable to arrive at the conclusion required by the statute, either that the corrupt acts were of such trifling nature or extent that the result could not be affected, or could not be reasonably supposed to be affected by such acts, either alone or in connection with other illegal practices.

I agree with the distinctions drawn by Cameron, C. J., between an isolated act done by a person whom the law, as it were, forces us to consider in that transaction the agent of the respondent, and the acts, several in number, of a man shewn to be the most active agent and manager of the party, and who took such a very active part in the canvassing and arranging for bringing up the voters, and in the general guidance of the whole contest. My brother Cameron puts this distinction in a very powerful and intelligible light.

I think it impossible to rightly appreciate the effect and meaning of this 159th section except by a careful consideration of the aspect of the whole conduct of the contest on the evidence before us.

We must remember that the law avoids the election for these corrupt acts. It is for the respondent to bring himself with reasonable clearness within the sheltering provisions of the section. I am unable to hold that he has done so. We have before us a very close contest in which the change of a dozen votes from one candidate to the

other would alter the result. We find two very distinct acts of bribery of persons professing to represent several other voters in their families. We find the briber, apparently the most active agent and manager for the respondent, committing other illegal and questionable practices; and we are asked to find that such matters were so trifling in their nature and extent as to convince us that they could not reasonably be supposed to affect the result. I am wholly unable so to find. Whatever may be the result of another election in East Simcoe, I am of opinion that the expense and trouble it may cause may be profitably borne and incurred in the interests of purity of election and in the prevention of the success of practices by such election agents as Mr. Harvie.

The fullness of the judgments of the learned Judges renders it unnecessary for me to discuss the same matters at greater length.

PATTERSON, J. A.—This matter comes before us under section 57 of the Controverted Elections Act, R. S. O. ch. 11, which provides that “In case of disagreement between the judges before whom a case is tried, they shall certify such disagreement, and either party may thereupon bring the matter before the Court of Appeal, and that Court shall, in disposing thereof, have the same jurisdiction in all respects as on an appeal from a decision of such Judges.”

The case was tried before the Chancellor and the present Chief Justice of the Common Pleas.

Those Judges disagreed upon two matters, one touching the effect of certain irregularities, and the other respecting the effect of some corrupt practices.

The days fixed by the Lieutenant-Governor in Council for holding the election and for the polling, under sec. 26 of the Election Act, were the 20th and 27th February, 1883. Section 33 makes it the duty of the Returning Officer to fix the hour for election “between eleven o’clock in the forenoon and two o’clock in the afternoon” of the day fixed by the Lieutenant-Governor for opening the election.

It happened that a snow storm prevented the Returning Officer from reaching Orillia, where the nomination was to take place, until after two o'clock. When he arrived the nominations were made. The petitioner was present when they were made, as he tells us in his evidence; and he was not very sure whether that was before or after two o'clock. It is, however, shewn or conceded that it was a few minutes after two.

The poll was held on the proper day. The petitioner says he did not vote, and gives as a reason that he heard there were irregularities, namely, the running out of the ballots at one polling place; and that money was given; and that the nomination was not correct.

This irregularity in the time of the nomination is the subject of the first disagreement.

The learned Judges certify that they are agreed that the proceedings were not begun till shortly after two o'clock, and that the omission to begin before that hour was not designed or wilful; but that they differ in their judgments as to the effect of the omission upon the election. The Chancellor certifies that in his judgment the whole of the election proceedings were not, by the omission, rendered nugatory and null; and that the election ought not thereby to be avoided. And the Chief Justice certifies that in his judgment the whole of the election proceedings were, by the omission, rendered nugatory and null; and that the election ought thereby to be avoided.

We are not required to pronounce upon this matter of difference.

The statute 47 Vic. ch. 4 (O.), which was passed after the delivery of the judgments upon which the disagreement arose, declares, in section 48, that "it has been and is the policy of the election law, and the intention and meaning of the several statutes in that behalf, that no election was or is void for any irregularity on the part of the returning officer, unless it appears to the tribunal having cognizance of the question that the irregularity affected the result of the election."

Finding this new law, which seemed to bear upon this particular dispute, Mr. McCarthy did not press before us the objection on the score of irregularity.

I think he acted wisely in putting his case on the stronger ground of the corrupt practices, notwithstanding that there may be room for arguing that the "irregularity on the part of the returning officer," dealt with by section 48, could not be intended to include an omission such as that now in question, and which is expressly made the subject of a different provision in section 15 of the same statute. That section, which by section 45 applies only to future elections, adds to section 33 of the principal Act a sub-section declaring that "In case the returning officer, from any unforeseen delay, accident or otherwise, does not open the election until after the hour named, the election shall not on that account be invalid, if it appears to the tribunal having cognizance of the question that the delay did not affect the result of the election."

Here the Legislature apparently treat the prescription of the time at which election proceedings are to begin as not directory only, but so essential that any departure from it, from whatever cause, and without regard to its influence on the election, would vitiate all subsequent proceedings and render the election void. That consequence is mitigated by this new sub-section in the case of the delay with which it deals; but other mandates of the Election Act may be violated; and this enactment may legitimately be pointed to as justifying the application to them of the same rule of construction in all its rigour. There may thus be "irregularities" enough for section 48 to cure without its being held to cover the case before us.

To hold that it applied to this case would involve the recognition of an unusual sort of legislation. We should not have the recital which is sometimes made of the law as it stands, for the purpose of introducing an amendment of it; but we should have in section 15 a rule laid down for future elections, and in section 48 a different and *ex post facto* rule applied to those which had

taken place and were *coram judice*. Very plain language would be required to lead the Court so to interpret these two provisions of the one statute; and here the language creates no such necessity. The "irregularity on the part of the Returning Officer" of section 48, may or may not be a phrase appropriate to describe delay caused by unforeseen causes or accidents, which is what section 15 specifically deals with, and what occurred in the present instance. There need be no difficulty in holding that the two sections deal with different things.

On the question of corrupt practices the learned Judges certify that they are agreed that William M. Harvie, an agent of the respondent Drury, was guilty of the corrupt practices of bribing John Thornton and Daniel Regan, and of hiring the team of Timothy O'Connor to carry voters to the polls; and that Patrick Finn, a licensed tavern keeper, did, on polling day and during polling hours, in Orillia, give liquor to the said Harvie and one Mellen; and that Jeremiah Osser, a licensed tavern keeper, did, on polling day, at his tavern in this electoral district, give liquor to persons therein, and that Osser was not an agent of Drury; but that they differ as to the agency of Finn, and as to the effect upon the election of the corrupt practices proved.

The Chancellor holds that Finn was not an agent, and the Chief Justice thinks he was. And the Chancellor holds "that said election ought not to be avoided by reason of the corrupt practices by agents of the respondent, Charles Drury, and other illegal practices proved, having regard to the provisions of section 159 of the Election Act of Ontario;" while the Chief Justice certifies his opinion "that the said election ought to be avoided by reason of the corrupt practices by agents of the respondent, Charles Drury, and other illegal practices proved to have been committed at the said election."

The first question presented is, what is the issue raised by these last statements?

To entitle a candidate to the benefit of section 159 it is in the first place necessary that the corrupt acts committed by the agent were committed without the knowledge and consent of the candidate. We do not know from the certificate whether the learned Judges agreed or disagreed on this vital fact. Assuming, as I think we may, that they really agreed upon it, though it is omitted from the certificate, the enquiry then is were the corrupt acts of such a "trifling nature" or such "trifling extent that the result cannot have been affected, or be reasonably supposed to have been affected, by such act or acts, either alone or in connection with other illegal practices at the election."

It was upon this question that the difference of opinion really existed, as we learn from reading the judgments delivered, and from the argument before us.

I have had occasion rather frequently to consider the bearing of sec. 159 upon the facts of particular cases.

In two cases following the last general election, viz., *West Simcoe*, ante p. 128, and *Welland*, (not yet reported) I attempted to express some general views which I thought applicable to it; but I can still say, as I said in the last named case, that I never approach the subject of its application without feeling that a task has to be undertaken for the performance of which we have a rather indefinite rule laid down, although, perhaps, as definite a one as could be framed in view of the endless variety of facts to which it has to be applied. We have to say whether, a corrupt act having been proved to have been committed by an agent, the direct effect of which is to avoid the election, the case is one in which the trouble and expense of a new election would be unnecessary and useless; and the criterion is, if the corrupt act committed by the agent was of "such trifling nature," or was of "such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been affected by such act, * * either alone or in connection with other illegal practices at the election."

It may, I think, be taken as quite clear that the effect of the corrupt acts or illegal practices is not to be gauged by reference to the number of votes which on a scrutiny they would probably cause to be struck off, or even by doubling that number on the hypothesis that a vote cast for one candidate under a corrupt influence, might have been cast for the other. That would no doubt be a proper consideration ; but the estimate to which it might appear to lead would not be the measure of the influence which for the purposes of section 159 it would be permissible to ascribe to the corrupt act. Its nature and its extent would have to be judged from considerations arising on the facts of each case, and incapable of being defined in any general formula.

The important feature of the present case is, the fact that a series of corrupt practices has been established against Mr. Harvie, who was not only a prominent supporter of the respondent, but was the man most active in his own exertions and most generally recognized as the leading actor on behalf of the respondent in the principal town of the riding, and who was the treasurer and one of the leading members of the Reform Association of the riding. Two acts of bribery, and some other corrupt practices are brought home to him ; he is certified to have been a party to the commission by Patrick Finn of another statutory corrupt act, namely, the selling or giving of liquor at his tavern during the hours of polling ; and when Daniel Regan applied to Ramsay for whiskey it was Harvie who, by an evasion of the law, procured it for him from a druggist. The bribery established against him was also effected under a guise, transparent enough, but nevertheless thrown over the transactions with both Regan and Thornton.

Reading his own evidence I receive from it the same impression conveyed by the other witnesses who speak of him, namely, that he was not likely to hesitate over anything that seemed to him to promise a vote more for his candidate from any scruples about breaking the laws against corrupt practices.

I cannot regard an act of bribery committed by a man in the position of Mr. Harvie—and while pushing with so much zeal and so little regard for the law, the interest of his candidate in the contest then going on—as of the same character as one isolated act by one of the rank and file, whose position in the party was more obscure, and whose influence was more limited, although coming within the class of agents under the election law.

Can we say these acts of his were trifling in their nature or trifling in their extent?

I am not disposed to adopt the definition of trifling suggested by Mr. McCarthy, as turning on the comparative delinquency of one act or another. We should have to decide upon a standard of morals not yet generally recognized, before pronouncing bribery *malum in se*, to the extent of denying that any act of bribery could be called trifling.

It would, besides, be hard to settle the degrees of guilt under our statute which classes under the category of corrupt practices acts of widely different tendencies. Bribery, it, of course, denounces as a corrupt practice ; but it applies the same stigma to other acts which may be free from all taint of corruption, and incapable of influencing a vote ; as, to take an extreme example, the giving of a glass of beer during the hours of polling by a tavern keeper to a stranger to the riding, or a political opponent who has already voted. Nor does it discriminate in the imposition of its most severe penalties between acts to which moral blame may be supposed to attach and others which are only its *mala prohibita*. Thus a candidate equally exposes himself to disqualification by treating a small meeting of his well-to-do friends and supporters in a remote and thinly settled township, and by buying the votes of the lowest classes of a city constituency.

I allude to these features of our local election law, not for the purpose of questioning the policy of the law, but, as bearing out, as I think they do, my opinion that the

Legislature used the words "trifling nature" in section 159, without any direct reference to the character which moralists may attribute to one or the other of the acts which it classes under the common name of "corrupt practices"; but with reference to something which tends more directly to affect the result of an election.

I think we may properly test the *nature* of an act, whether corrupt or lawful, by considering the circumstances under which and the person by whom it is committed.

I ventured an illustration of this idea in my judgment in the *Welland Case*, (not yet reported,) which I may here repeat.

Let us suppose the charge made and proved to be that A. an agent bribed B. a voter by the payment of one dollar; and let us suppose that A. is shewn to have had with him a large sum of money under circumstances which raise a strong and not unreasonable suspicion that his object was to use it in purchasing votes, one circumstance being the payment of the dollar to B., but the rest of the money not being traced on the one hand, or accounted for on the other. While the *extent* of this corrupt act, being measured by its influence on the one voter, might be trifling, its *nature* as one overt act of what appeared, or might reasonably be assumed, to be an arranged system of operations, could not properly be said to be trifling.

That seemed to me to be a fair illustration, and I still think so; and I think it puts essentially the case of Mr. Harvie in the contest at Orillia.

If it were necessary to find the fact affirmatively, I should say there is evidence to warrant, if not to compel, the conclusion that the acts proved are each one an instance of the spirit in which the leading actor on the side of the respondent was conducting the contest; and that, viewed in that light, they cannot be said to be *trifling in their nature*. We may not be able to judge of their extent. There is danger, in attempting to do so, that we may glide unconsciously into the idea of a scrutiny, and try to estimate the number of votes we may be able to say they influenced.

If we entertain the question of extent, we must remember that the affirmative finding must be that they were trifling in their extent

We know from the evidence that in one case, if not more, the influence of the bribe was not confined to the person bribed, for Thornton tells us that he went to Harvie in consequence of what Regan told him of his success, and Harvie himself speaks of the proposal of one or both of these men to influence their friends.

I pay no attention to Thornton's statement that he voted for the candidate against whom Harvie was working. Such evidence is not trustworthy, even if admissible; but it tends only in the direction of scrutiny, and so is outside of the present inquiry.

I am of opinion that we cannot hold that the corrupt acts committed by William M. Harvie were of such trifling nature or were of such trifling extent that the result of the election, which was a majority of 23 in favour of Charles Drury, cannot have been affected or be reasonably supposed to have been affected by them; and that the certificate to the Speaker, under section 55 of the Controverted Elections Act, so far as the matter of disagreement certified to this Court is concerned, should be that Charles Drury was not duly returned or elected.

I think the costs of this reference to this Court should form part of the costs of the petition, to be paid as may be adjudged under sections 97 and 98 of the Controverted Elections Act.

OSLER, J. A.—This case comes before us under section 57 of the Controverted Elections Act, R. S. O. ch. 11, the learned trial Judges having differed in their judgments as to the effect upon the election of certain corrupt practices proved to have been committed by one Harvie. They also disagreed as to whether one Finn was an agent of the respondent; and on some other points of considerable importance which have not been pressed and are not necessary to be noticed.

I think Finn's agency was not made out for the reasons mentioned in the judgment of the Chancellor.

The case turns upon the corrupt practices proved to have been committed by Harvie.

The respondent's majority was 21 on a total poll of 2800 or 2900 votes.

Harvie was not merely an influential supporter and agent of the respondent. He was the chief executive officer or secretary of the party association for the riding; a delegate to the convention at which the respondent was nominated, and one of the active organizers and managers of the election contest. He is proved to have been guilty of two acts of bribery by gifts of money under the guise of loans as to which the Chancellor says: "the pretence of a loan is of the flimsiest texture, through which the transaction is plainly manifest;" and the learned Chief Justice: "that it was too thin a veil to conceal the true and corrupt nature of the transaction." He was also proved to have committed the further corrupt practice of paying one Connor \$5 for the use of his team on polling day.

These corrupt acts having been proved, the election is *primâ facie* avoided by the 158th section of the Election Act, unless the respondent can satisfy us that it ought to be upheld under section 159.

That section is a short one, but in the opinion of every Judge who has had occasion to consider it, a very embarrassing one.

The preamble declares that its object is "To prevent the expense and trouble of new elections when unnecessary and useless." It then proceeds: "In case of a corrupt act or acts being committed by an agent without the knowledge and consent of a candidate, if the corrupt act or acts was or were of such trifling nature, or was or were of such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been affected, by such act or acts, either alone or in connection with other illegal practices at the election, such corrupt act or acts shall not avoid the election."

I think the section is capable of a broad yet fair construction, by which the standing menace it presents to the purity of elections may be minimized; though a narrower view of it may be taken; and the avoidance of an election may be made practically to depend upon the number of votes actually proved to have been affected.

It cannot be denied that bribery is a corrupt practice which the section permits of being condoned. The Legislature has chosen to put it on the same plane in this and other respects with other acts, which, though called corrupt practices, are not *mala in se*. But the Court in considering whether a corrupt act is trifling in its nature or extent, cannot lose sight of the distinction, and will bear in mind that bribery has always been deemed the head and front of election offences: that its influence is by no means necessarily limited to the particular individual bribed; and that its forms are in a high degree Protean and difficult to trace.

I think it was not intended that anything like a scrutiny of bribed or corrupted votes should be entered upon or a count of corrupt practices. One corrupt act will avoid the election, and that act may have been of such a character, or committed in such circumstances, or by such an agent, as to raise the doubt whether those who are responsible for the management of the election, were trying to conduct it purely. An act of that kind cannot be trifling in its nature, and must be looked at, apart from its effect upon the single vote.

The position which the briber occupies with relation to the candidate and the conduct of the campaign, appears to me, with great respect for those who hold the opposite view, to be a matter of the first importance in gauging the nature or extent of the corrupt act. I will not attempt to define what acts of bribery are, (since some it seems there may be,) trifling in their nature and extent. I leave each case to be disposed of upon its own circumstances as it arises. But, to use an illustration: what comparison can there be between a deliberate bribe of \$1 or

\$5 given by the chief promoter or manager of the election to a needy voter, and his day's wage given by an employer, technically perhaps an agent, to his hired man? It will be said that each is an isolated case and represents only one bribed vote. But that is not so. The latter is comparatively venial; but the former soon becomes notice to every man who is willing to sell his vote, that money may possibly be obtained for it. Bribery cannot justly be described as trifling in its nature which proclaims to the corruptible portion of the electorate that the managers of the election are willing to traffic in corruption.

Or again, suppose a case where a single act of bribery is shewn to have been committed by the holder of an election fund, and the disposition of the rest of the fund is not accounted for. It may in a sense be said truly enough that the result is not affected by the single vote, but the nature of an act committed in such circumstances, even when but one has been proved, renders it improbable that it was of an isolated character; and, when we find it repeated, it becomes extremely difficult to believe that corruption stopped there, and that the result of the election may not thus have been affected by an act or acts which shew a willingness to bribe. When there is a large majority, and the evidence discloses but a few corrupt practices, the inference may be cogent that the circle of corruption was not wide enough to embrace it; but with so narrow a majority as we have in the present instance I think it impossible to say that "the result" of the election "cannot have been affected or be reasonably supposed to have been affected," by the three corrupt acts proved substantially. Therefore I agree with the view which Chief Justice Cameron has expressed as to the proper construction and application of section 159.

I have considered only the corrupt practices with which Harvie is charged, as they, I think, are sufficient to dispose of the case.

I presume that the mode of disposing of this matter, so far as this Court is concerned must be taken to

be settled by the decision in the *West Northumberland* Case, but as the question has been again discussed, and that case has not been reported, and the result of our adhering to it seems likely to be that this case may, as that one has been, be left undisposed of I desire with deference to say that, in my opinion, on a proceeding of this kind the whole case is before us on the evidence, and we ought to dispose of it in all respects as on an appeal from the decision of the trial Judges (sec. 57), who, having been unable to agree upon a report or other disposition of the case, would appear to be *functi officio*, although that is a question which is not, and cannot come, before us, but must be determined, if we decline jurisdiction, by the learned Judges themselves, we have no authority to give them any direction on the subject: they are not bound by our opinion, nor can we enforce it. The statute provides for different modes of disposing of the case in different circumstances. If the trial Judges agree they dispose of it, and report or certify to the speaker. From this decision there may be an appeal; and then it is the judgment of the Court of Appeal which is certified to the Speaker. But if the Judges disagree, they are to certify such disagreement, not to the Court of Appeal, but merely to certify it, and either party may then bring the matter before the Court of Appeal, which Court, in disposing of it, has by section 57 of R. S. O. ch. 11, the same jurisdiction in all respects as on an appeal from the decision of such Judges.

What is that jurisdiction? It is under section 65 to give, on the whole case, the same judgment which the Judges should have given, under section 66; to review the decision upon questions of fact as well as of law, and to draw such inferences of fact as the Judges should have drawn; under section 67 to make amendments and receive further evidence; under section 69 to make such order as to costs as may seem just, and under section 70 to certify through their clerk their judgment to the Speaker.

There is not a syllable in the Act which authorizes the Court of Appeal to send the case back to them in either events, merely to certify the opinion or decision of that Court. We are dealing with a special and limited jurisdiction, both of the Judges and of the Court of Appeal. The latter are expressly authorized to send the case back to the former under section 71, for a new trial to take the evidence, or additional evidence ; in which event, subject to any direction given by the Court, the case is to be proceeded with as if there had been no appeal ; but when they are not proceeding under that section I know not where any authority is to be found in the Act for disposing of a disagreement otherwise than as an appeal is disposed of, viz : by certifying the judgment of the Court of Appeal to the officials of the House.

This view is incidentally supported by section 56, which enables the Judges to reserve questions for the Court of Appeal, and to postpone their report or certificate until the determination of such questions by the Court.

If we treat the word disagreement as limited to some particular charge, taking others as proved or not, as the Judge may have determined, we deprive the party of an appeal in respect of those charges if we cannot send the case back to the Judges to dispose of ; while, if we can do so, we hold that the case may come back to us as often as, or whenever they happen to disagree. There may for instance be a disagreement as to whether the corrupt practices have been proved ; the case comes before the Court on that disagreement, and they determine that such practices are proved. It then goes back to the learned Judges, and one of them thinks the election should be avoided, while his colleague thinks that it would be saved under section 159. It again comes before the Court of Appeal ; and, if they can agree, it goes back to the Judges with an intimation that section 159 will not apply. The Judges being at last in a position to give judgment on the case, do so, and set aside the election. Or the Judge may disagree as to one or more im-

portant charges, finding all the others not proved, and the case comes up on that disagreement to the Court of Appeal, who determine that the charges in question were not proved, and on the case going back to the Judges they dismiss the petition. Until they had done so there could be no appeal, and now the petitioner appeals from the decision on the ground that the other charges were proved. The result of that appeal may be that the Court sets aside the election.

If we construe the section as referring to a disagreement as to the disposition of the whole, which I humbly think is its proper meaning, we treat the whole case as open to both parties irrespective of how any particular charge may have been decided just as on an appeal, every point is open to the appellant. The convenience of such a course seems obvious, and it is an additional reason for adopting the, as it seems to me, quite admissible construction, that on a disagreement the Court must dispose of the whole case as upon an appeal.

We should, I think, direct the registrar of this Court to certify to the Speaker under sections 57, 65, and 70, the decision of the Court that the respondent is not duly elected or returned, and that the election is void.*

The respondent should pay the costs of the cause, including those of the present proceeding.

BURTON, J. A.—It is not necessary to refer to the first point upon which the learned Judges disagreed, as, even if there were any doubt as to the effect of the irregularity, it has been cured by legislation. (a)

As to the other irregularities on the polling day, both Judges concur in holding that they did not affect the result of the election, and are cured by sec. 197. These matters may, therefore, in my opinion, be eliminated entirely in the consideration of the questions submitted to us.

*See now 48 Vict. ch. 2, sec. 15, (O.)

(a) 47 Vic. ch. 4, sec. 48 (O.) See p. 336, where the section is set out.

Both Judges agree, and I concur in their finding, that Harvie, who was shown to have been the secretary of the Reform Association, and to have taken an active part in the election under such circumstances as to make the respondent responsible for his acts, did commit two acts of bribery by the pretended loan of two small sums of money to voters.

And at the hearing, the particulars were amended so as to add a charge of hiring a team of one Connor on polling day, which was also proved—although the learned Chancellor thinks that it was a trap set for the person applied to. I agree with the learned Chancellor in holding that there was no evidence upon which any Court would be warranted in holding the agency of Finn established.

The three acts, however, which were established were sufficient, apart from section 159, to avoid the election; and the questions for our decision is, as to the effect of that section as applied to the facts of this case.

The Judges have not found, as a fact, that the acts in question were committed without the knowledge or consent of the respondent; but it was admitted on the argument, and it is clear upon the evidence that the respondent was not privy to them; and there is no reason to suppose from^m a perusal of the evidence that the respondent did not, so far as he was personally concerned, endeavour to conduct the election fairly and honestly.

We should in considering this [case bear in mind the course that was invariably pursued by Judges trying election petitions before the passing of the amendment. There was I may say an universal consensus that elections ought not lightly to be set aside under such circumstances as I have just referred to.

In the *Warrington Case*, 1 O'M. & H. 44, Baron Martin says: "I adhere to what Mr. Justice Willes said at Litchfield, that a Judge to upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside."

In another case, *Taunton Case*, 2 O. M. & H. 75, the same learned Judge says: "If I am satisfied that the candidates intended honestly to comply with the law, and meant to obey it, and that they themselves did no act contrary to the law, * * I will not unseat such persons upon the supposed act of an agent, unless the act is established to my entire satisfaction."

Approved by Mr. Justice Mellor, in the *Barnstable Case*, 2 O'M. & H. 106. And similar remarks are made by the Chief Justice of the Supreme Court in the recent case of the *Berthier Election Case*, 9 S. C. R. 102.

It was a struggle in fact on the part of the Judges not to avoid elections unnecessarily when the candidate had acted honestly, although the only means they possessed were to require the very strictest evidence of the corrupt practice on the part of the agent and of his agency.

And with reference to the evidence, in connection with the remarks I shall presently have to make, it was always required to be clear and satisfactory. No amount of evidence, said that very eminent Judge, Mr. Justice Willes, ought to induce a judicial tribunal to act upon mere suspicion or to imagine the existence of evidence which the petitioner might have brought forward.

Whether, if when the Judges have found a corrupt practice, and the party has to rely upon the curing effect of section 159, the onus is shifted or not, may admit of some question; but one thing is clear, that in applying that section, and in coming to a conclusion as to whether the acts were of such a trifling nature and of such trifling extent that the result cannot be reasonably supposed to have been affected by them, either alone or in connection with other illegal practices, the Court is bound to act upon the evidence and upon that alone. There are some persons who believe that every election is carried by means of corrupt acts and illegal practices, and who could never be brought to believe that the result has not been affected. I do not myself entertain so low an estimate of the electoral body; but, if I did, I should be bound not to act upon that con-

viction, but to ascertain whether the corrupt acts and illegal practices proved were of the character and extent indicated, and affected the result, or might reasonably be presumed to do so.

I agree that if, as in the *Lincoln Case*, H. E. C. 498, it were shown that there had been a considerable expenditure of money, and that an agent had for some time before the election endeavoured by the expenditure of money to influence the election, and that two corrupt practices were proved to have been committed by agents of the respondent with his money and in concert with the agent who had been guilty of that corrupt expenditure, I could not as a juror in such a case say that the acts were of such trifling extent that the result might not have been affected.

But how can I as a juror do so here? The corrupt acts proved are two in number, and isolated acts. There is no other improper expenditure of money shewn; and these two acts, though committed by a person who is constructively an agent of the respondent, was not an agent of his selection. They are like the other charges referred to in the *Lincoln Case*, where Mr. Justice Patterson held that they did not, either alone or in connection with the Belden cases, extend beyond the votes affected, p. 493.

They are precisely such acts as Judges under the old law would require to be proved in the clearest and most conclusive manner, having in view the serious results entailed by them upon the respondent and the constituency.

There was a third act of a different character, an act not *malum in se*, but made a corrupt practice by the statute, the hiring of a team by this same agent on polling day.

It was further proved, that a tavern keeper, who was not shown to be an agent of the respondent, gave liquor to this same agent and one Miller on polling day during polling hours, and that one other tavern keeper, not an agent, had committed a similar offence. There is no pretence that either of these practices were committed with a corrupt intent, or with any intention to affect the votes of any one; and no other illegal practices are proved.

How can I say as a juror that these were not acts of a trifling nature, and trifling in extent? How can I say that they affected or could reasonably be presumed to have affected the result? It is impossible to do so from the facts themselves, or from any inference to be properly and reasonably drawn from them. On the contrary I am compelled to find that the result was not affected, and that the acts themselves were precisely of the character which the Legislature intended should not avoid an election, which appeared to have been in other respects fairly conducted.

The learned Chief Justice of the Common Pleas is of opinion that the section is very pernicious in its effect, and calculated to open the door to a good deal of corruption in the conduct of elections, and is very fearful that, unless his construction of the effect of that section be adopted, the Act for the prevention of corrupt practices would be so much waste paper.

Without sharing his apprehensions I submit with deference that with that we have nothing to do, but are bound to defer to the expression of the Legislature, without indulging in speculation either upon the consequences or corruption to which the law may give rise.

"I cannot tell," says Mr. Justice Patteson, in *The Queen v. Justices of Lancashire*, 11 A. & E. 143, 157, "what consequences may result from the construction which we must put upon the statute; but, if mischievous, they must be remedied by the Legislature."

And again Lord Abinger lays it down that a Court of Law ought not to be influenced or governed by any notions of hardship. Cases may require legislative interference, but Judges cannot modify the rules of law: *Rhodes v. Smethurst*, 4 M. & W. 63.

If there is one term in connection with the construction of documents or Acts of Parliament to which I have a greater aversion than another, it is the much used and still more greatly abused one of "judicial discretion;" and I may be excused for citing the remarks of that very able jurist, Mr. *Sedgwick*, on the subject.

“Indeed,” he says, “the idea that the Judges in administering the written law, can mould it and warp it according to their notions, not of what the legislator said, not even of what he meant, but what in their judgment he *ought* to have meant—in other words, according to their own ideas of policy, wisdom, or expediency—is so obviously untenable, that it is quite apparent that it could never have taken rise, except at a time when the division lines between the great powers of government were but feebly drawn, and their importance very imperfectly understood. * * It must inevitably be attended by two great evils. It gives the judiciary a power almost arbitrary, and which cannot fail to be abused, and it leads to unbounded carelessness in the matter of legislation :” *Sedgwick on the Construction of Statutes*, 2nd ed., p. 265.

I cannot help feeling that the learned Judge has fallen into this error in construing this enactment ; and that I may not be supposed to have misinterpreted his meaning, I quote his words :

“I am bound to hold in giving a just interpretation to sections 158 and 159, when it is established that a recognized, important, and influential agent is proved to have committed one or more deliberate acts of bribery, the candidate cannot retain his seat though the votes shewn to have been affected thereby might be struck off without putting the candidate in a minority. In the present case the respondent was the candidate of the Reform Association, he in one sense in the management of the election, was more their agent than their principal, and Mr. Harvie, the secretary of the association, was, according to the evidence, one of the most active members of the organization, the counsellor and referee, so to speak, of the President. To permit, therefore, corrupt practices committed by him, to have less force than if they had been committed by the candidate himself upon the election, would be establishing a most dangerous precedent, which, if it must be established, its creation will be a duty devolving upon those who have a right to review and overrule my judgment.”

I may presently have to refer to this language as not being fully warranted by the evidence, so far as it professes to deal with Mr. Harvie as a recognized agent, or as having in this respect acted as an official of the association. In disbursing their moneys he was an agent undoubtedly, but not an agent of the respondent's selection; but I can draw no other meaning from the Judge's language than that as one single corrupt practice committed by the candidate necessarily avoids the election, the same result must follow in all cases where the agent is the secretary of an association which brings out the candidate.

I do not think that that view of the law is generally acquiesced in; and should the Legislature ever adopt such a law it would be reasonable that the matter should be carried a step further and the agent made the respondent and responsible for the costs, the candidate being only a formal party with the view to the seat being vacated.

That the learned Judge takes a very extreme view of this, and does not interpret and expound it, as in my humble judgment, enactments ought to be expounded, is manifest from the views he expressed in another case now before us.

The learned Judges in that case agreed only upon one act of bribery. The learned Chief Justice, it is true, found one other act proved, but the Chancellor held that there was no evidence of agency. All the other charges were attempted to be established by evidence of so unsatisfactory a character that the Chief Justice felt bound to give the respondent the benefit of the doubt; and the Chancellor held them not proved.

But, though the respondent had made the return of his election expenses, as required by the election law, the learned Judge was of opinion that the form of the return was not in conformity with it: that the personal expenses should have been returned more in detail; and "from the want of observance by him of this requirement of the statute."—I quote from the learned Judge's judgment—and his failure to procure the attendance of a witness,

whose attendance it was not obligatory upon him to produce, the learned Judge refused, as he expressed it, to extend to him the benefit of section 169. In other words he unseated the candidate because he had not made the return of his election expenses in the form in which the learned Judge thought it should be made.

But with great deference I think this is an entire misconception of the section which vests no such discretion in the Judge.

Under the 161st section, if a candidate himself is found guilty of a corrupt practice, his election becomes *ipso facto* void, and he himself disqualified.

Section 162 enables the Court to relieve him from the disqualification, if he satisfies the Court of three things.

In the *Muskoka and Parry Sound Case*, ante p. 197, the corrupt practice brought home to the candidate was of a very trivial nature; but he was unable to satisfy the Judges that tried the case that he had established one or more of these three matters which were necessary in order to obtain relief.

This enactment is very different. Section 158 provides that any corrupt practice committed by an agent shall avoid an election except in cases coming within section 159, which I have already quoted. We are bound to place a fair and reasonable construction upon that section, if it is intelligible; and I confess I do not in the present case see the difficulty of construing it that has been suggested.

I can perfectly well understand that when it is shewn that large sums of money have been expended by an agent or by an association acting in the interest of the candidate, of which no satisfactory account is given, and one or two acts of bribery are shewn to have been committed by that agent or association, and especially in cases where the majority is not large, there may be very great difficulty in the Judge finding that the result may not have been affected. It is sufficient to say that that is not this case. There is no evidence of any large sums in the hands or under the control of this association. Of the sum subscribed by some

individuals, which was insignificant in amount and which is not shewn to have been received, a very large proportion was shewn to have been paid away in legitimate expenses. Mr. Harvie was examined and denies any other expenditure, and was believed by the Chancellor; and, in this as in every other case, every presumption must be made in favor of innocence. Of the numerous charges preferred, nearly 100 in number, these three only were proved, and these are acts of a volunteer, not an agent selected or chosen by the candidate, but of a man who appears to have shewn more zeal than discretion in his management of the duties he undertook.

We are now called upon to draw two very forced inferences without any evidence that would properly lead to such inferences: the first, that the association were parties to the two silly acts of the person who filled the position of their secretary; the other, that the bribery was not confined to these two acts and that the association were parties to other acts, of which no proof has been given, or offered or suggested. Upon no other theory can it be inferred that the acts were not of trifling extent, except that they were acts of an association which by reason of its extensive ramifications, had the means of bribery. In other words we are called upon to fix the gentlemen constituting this association with fraudulent and corrupt conduct without evidence of it. For myself, I must decline to draw such inferences, more especially in a case where we are called upon to give effect to an enactment having for its object the saving of certain elections and preventing them being avoided upon light and trifling grounds.

I have taken the trouble to read over not only the passages to which our attention was called, but the whole evidence, which satisfies me not only that the candidate did his best to conduct the election fairly and honestly, but that the election, so far as we can gather from the evidence, was, with the exception I have referred to, remarkably free from corrupt acts and illegal practices of all kinds. Under these circumstances it would not be surprising if

the good sense of the constituency revolted against this interference with their rights, and that the result of a new election would be to show that the avoiding of the present one was in the words of the Act of Parliament useless and unnecessary.

I concur in the able, practical, and, if I may be allowed to say so, well reasoned judgment of the Chancellor, and am of opinion that it should be affirmed.

G. F. H.

SOUTH RENFREW.

PROVINCIAL ELECTION.

BEFORE THE COURT OF APPEAL.

Present: MR. CHIEF JUSTICE HAGARTY, MR. JUSTICE PATTERSON, MR. JUSTICE OSLER, AND MR. JUSTICE MORRISON.

JOHN HARVEY, *Petitioner*, and JOHN FRANCIS DOWLING, *Respondent*.

TORONTO, *November 24, 1884.*
December 18, 1884.

Election Act R. S. O. ch. 10, secs. 154, 161, 162—Controverted Election Act R. S. O. ch. 11, sec. 2 sub-sec. 6, sec. 33—Corrupt Act—Illegal Act—Payments of voter's travelling expenses—Concurrent finding—Disqualification, removal of—Retrospective Act—47 Vic. ch. 4, sec. 48 (O.)—Refusal to award seat to minority candidate.

A provincial election trial was held in 1883, before Cameron, J., and Boyd, C., who made separate reports agreeing in voiding the election under R. S. O. ch. 10, sec. 161, by reason of respondent paying or consenting to the payment of the travelling expenses of certain voters to convey them to the poll; but differing in their judgments as to whether the respondent was guilty thereby of a corrupt practice under said sec. 161. CAMERON, J., reported that respondent was proved guilty of said corrupt practice, and BOYD, C., reported that the said respondent committed an illegal act under sec. 154 in sanctioning such payment, but without any corrupt intent, and in ignorance, which was involuntary and excusable, under a belief that as long as he did not personally bear or pay the said expenses it was not illegal, and under the fullest belief that the said voters were bound or were willing to repay the said expenses or allow them to be deducted from their wages. A subsequent election took place on 18th January, 1884, when respondent was elected. A petition was filed attacking his election on the ground of the prior disqualification of the respondent.

Held, [PATTERSON, J.A., dissenting] affirming the judgment of the trial Judges, BURTON, J.A., and GALT, J., that the finding that the respondent was guilty of a corrupt practice was correct; and that he was therefore personally disqualified; and as there was not a concurrent

finding that he came within the relieving clause of sec. 162 the disqualification was not removed ; and that the amending Act 47 Vic. ch. 4, sec. 48 (O.), which was passed on 25 March, 1884, did not apply to this case.

Per OSLER, J. A. One joint report of the trial Judges under the hands of both is not essential ; but there may be two separate reports each under the hand of one of the Judges ; but

Quære whether the certificate under sec. 65 of the result of the trial should be joint ; this, however, was not now open to the respondent, for by his becoming a candidate at the subsequent election he must be taken to have admitted that the former election was on some ground or other regularly set aside.

At the nomination a protest was handed to the returning officer, signed by the defeated candidate and three electors, claiming that respondent was disqualified, and that the opposing candidate was entitled to the seat. Notice thereof was posted at some of the polls, and some electors were told of it.

Held, on the evidence, the trial Judges having refused to award the seat to the defeated candidate, that the Court in appeal would not interfere.

THIS was an appeal by the respondent from the judgment of the trial Judges delivered herein on September 12th, 1884, reported *ante* p. 70, where the facts are fully set out.

McCarthy, Q. C., and *A. R. Creelman*, for the petitioner.

Bethune, Q. C., and *William Johnston*, for the respondent.

December 18, 1884. HAGARTY, C. J. O.—Three points seem presented for our consideration on this appeal :

1. As to whether the respondent was by the trial Judges at the previous election declared guilty of a corrupt or illegal practice involving as a legal consequence a personal disqualification ?

2. If so, has the Act of last session saved him from such consequence ?

3. If disqualified, is the minority candidate entitled to the seat ?

As to the first, the trial Judges were the Chancellor and Chief Justice Cameron. They made separate reports. They agreed in avoiding the election, with costs to be paid by the respondent.

The Chief Justice held that he was guilty of the corrupt practice under section 161 of R. S. O. ch. 10, in paying or

consenting to the payment of the travelling expenses of certain voters to convey them to the poll.

The learned Chancellor reported (after agreeing to avoid the election, &c.) as follows: "And in further pursuance of the said Act, I certify that we, the said Judges, differed in our judgments as to whether the said candidate, the respondent, was guilty of a corrupt practice under section 161 of the Election Act. And I, the said John Alexander Boyd, for myself, certify that the said respondent committed an illegal act under sec. 154 in sanctioning the payment of voters' travelling expenses at such election, but without any corrupt intent and in ignorance, which was involuntary and excusable, under a belief that so long as he did not personally bear or pay the said expenses it was not illegal; and under the further belief that the said voters were bound or were willing to repay the said expenses, or to allow them to be deducted from their wages."

It is here certified in effect that respondent, "committed an illegal act under sec. 154; and then it is certified in effect that he was entitled to the benefit of the 162nd section as having no corrupt intent, and in excusable ignorance, and to have honestly desired and endeavoured to have a pure election.

Had both Judges joined in thus according to him the benefit of this excusing section, it would of course have relieved him from any personal consequences.

Had there been no such section as 162, the disqualification would arise as soon as the Judges found the respondent guilty of an illegal act under sec. 154, in sanctioning the payment of voters' travelling expenses.

This section declares its violation to be an illegal act, and the interpretation sec. 2, sub-sec 11, declares a corrupt practice to mean "bribery, treating and undue influence * * and any violation of secs. 151, 154 and 156," thus bringing the section into the same construction as if it contained the words corrupt as well as illegal act.

It would seem, therefore, that if both Judges had (without reference to the exculpatory clause 162) simply united in certifying that respondent committed an illegal act under sec. 154 in sanctioning the payment of voters' travelling expenses at such election, the disqualification would attach.

By the Controverted Elections Act, R. S. O. ch. 11, sec. 58, where a corrupt practice is charged, the Judges are to report (in addition to the certificate as to the due or undue return) "whether any corrupt practice has or has not been proved by or with the knowledge and consent of any candidate, and the nature of such corrupt practice." It may be that a return merely stating that the respondent committed an illegal act under sec. 154 would suffice, as that section is confined to one species of act, as to the conveyance of voters. It is not, however, necessary so to decide as the act is described in both certificates.

It was urged by Mr. Bethune that what the learned Chancellor adds to his certificate as to the charge shews that the illegal or corrupt practice was not in fact committed, especially that it was done, "under the belief that the voters were bound or were willing to repay the said expenses or allow them to be deducted from their wages."

It is not found that such was the case. The belief that it was the case, when in fact it was not, might be an excellent reason for reporting in his favour on the relieving clause; but when the fact was otherwise the unfounded belief could not prevent the act being illegal.

If the learned Judge found or believed that the voters were conveyed under such an arrangement then they would be travelling at their own expense to be paid out of their wages, he would then not have found that the respondent had committed this illegal act.

If a statute declared the employment of any voter or voters to do for hire any work connected with the election, and declared such to be a corrupt practice, then, if the candidate did so employ and pay them, I cannot think that he could escape the consequences merely because he believed that they were not voters.

I agree with the view expressed by my brother Burton, as to the marked distinction between the case of *Grant v. Overseers of Pagham*, 3 C. P. D. 80, and that before us. I fully adopt his reasoning on this.

The Imperial Act required it to be found by the report that bribery had been committed with the knowledge and consent of the candidate.

The report merely stated that he was guilty of a corrupt practice within the meaning of the Act. It then proceeds to state what it consisted of, viz., the promise to certain voters of an entertainment of meat and drink in the event of his election, with a view to induce them to vote for such candidate.

My learned brother has quoted from the judgment where it was held that the report did not find in the words of the statute that a corrupt practice had been committed with the knowledge and consent of the candidate, nor were words used "which unambiguously and necessarily involved a finding according to the Act of Parliament."

Again, at p. 86, and that the words "did not necessarily alone imply personal bribery or bribery by agents with his knowledge and consent."

I feel constrained to hold that the reports of the two learned Judges clearly hold that the respondent committed an act which the legislature designates as a corrupt act; and that the result must be that he was thereby personally disqualified.

The learned Judges did not concur in finding that he came within the relieving clause 162; and therefore the disqualification is not removed.

We have, secondly, to consider the effect of the Act of last session (a). The language of the 48th section is singularly infelicitous, as has been very clearly pointed out in the judgments below. They are so very full on this point that it does not seem necessary to travel over the same ground. It is stated to be, and always to have been the law, "that

(a) 47 Vic. ch. 4 (O.).

no candidate is disqualified or subject to any disability or penalty for any corrupt practice or alleged corrupt practice without the concurrent judgment to that effect."

Up to the passing of this Act no Judge's report declared in terms the disqualification of any candidate.

The election in question had taken place long before the passing of this Act, and the reports of the trial Judges of course contained no adjudication or declaration for or against such disqualification, but merely a finding of a fact from which such a legal consequence would properly follow. Can we be asked to assume that the legislature intended to declare that a report or reports of trial Judges, perfectly legal at the time they were made and clear as to the legal consequence to follow, should be held ineffectual to be followed by such consequence, unless some declaration or adjudication of disqualification should be contained therein, which was never heard of as necessary until the Act so declared it?

It may, as Mr. Justice Burton remarks, be held necessary so to declare in any report or reports to be made after the passing of the Act even if the elections had previously taken place.

We are in effect asked to hold that reports legally made before the passing of the Act, containing, as we hold, matter legally disqualifying a candidate, are made of no legal efficacy for that purpose without their containing a wholly new statement.

We are naturally reminded of the words of Brett, L. J., in *Bradley v. Baylis*, 8 Q. B. D. 195, at p. 230: "The difficulty arises from the fact of Parliament insisting upon saying that things are what they are not."

I think due effect may be given to this section by applying its very particular language to future reports of trial Judges as is suggested in the judgments appealed from; but I hardly like to be held as declaring judicially that future reports must necessarily contain the new declaration as it is not required for the decision of this case.

When the Act was passed the reports in the first election had been long made, and, as it were, had passed into judgment, as a new writ had issued on the vacancy declared by them, and a new election had, and a petition pending against such new election.

Then comes this legislation. I decline imputing to the Legislature—unless I find their intention expressed in language too clear for dispute—an intention to alter the legal effect of former election reports of Judges by requiring the insertion of some statement not formerly known or required by law.

The last clause of the section as to avoiding a new election by setting up corrupt acts at a former election, not set up and proved, and so adjudged by the two Judges at the former election, does not, I consider, affect this question, in the view I take in common with the learned trial Judges, of the legal effect of such former reports.

The remaining question 3, is as to seating the minority candidate. It is always an ungracious task thus to stultify the choice of a large majority of electors. It is undoubted law that if the Court be satisfied that notice of disqualification was clearly brought home to the electors so that they might reasonably know that they were throwing away their votes, they must take the consequences. Nor can it be considered that a belief in the non-existence of the alleged ground of disqualification can prevent such result.

Every case of this kind must depend on its own circumstances and the nature and extent of the alleged notice. It is a question of fact to be found by the trial Judges and their well considered conclusion on the facts before them in evidence ought not to be interfered with except on very sure grounds.

The question of the sufficiency or insufficiency of notice is fully discussed in such cases as *Regina v. Mayor of Tewkesbury*, L. R. 3 Q. B. 629, and *Drinkwater v. Deakin*, L. R. 9 C. P. 626.

It is a question of fact to be found by a jury or the Judges acting as a jury.

It is for them to say on the whole evidence whether the notice was sufficient.

The safest way is, of course, that recommended, of notifying every elector as he comes for a ballot.

Here the evidence was of posting notices at some of the polls; of agents stating that that they told the persons they met in certain localities.

All this was open to the objection, that no such notices were given in some localities: that many voters were illiterate; and the written notices were useless to them.

The learned Judges came to the conclusion that they were not justified in finding that they could hold a sufficient number of votes would have been so "thrown away," as it is called, as to seat the minority candidate.

It is impossible for me to say that they have arrived at a wrong conclusion on this question of fact; and I am of opinion that we ought not on such a matter to be astute to find reasons for interfering with their decision.

I think the respondent's appeal should be dismissed, with costs.

That of the petitioner should, with like result, be dismissed.

OSLER, J. A.—An election was held in February, 1883, for the Electoral Division of the South Riding of Renfrew, at which the respondent was returned as duly elected. He was afterwards unseated on petition on the ground of corrupt practices committed by him in paying or consenting to the payment of the travelling expenses of certain voters. The trial of that petition took place before the Chancellor and Mr. Justice Cameron.

Judgment was delivered on the 19th November, 1883, and the certificates or reports of the trial Judges were transmitted to the clerk of the Legislative Assembly on the 29th December, 1883. A new election was immediately held on the 11th and 18th January, 1884, at which the respondent was again elected. A petition against that return was filed on the 14th February, 1884, which

was tried before my brothers Galt and Burton on the 20th August, 1884. The respondent was again unseated on the ground that the result of the former trial was to disqualify him from being a candidate, the Judges not having concurred in relieving him from disqualification under section 162 of the Election Act.

What we have to determine on this appeal is :

(1) Whether on the reports of the trial Judges upon the former election petition it was sufficiently found that a corrupt practice had been committed by or with the actual knowledge or consent of the respondent so as to impose upon him the disabilities mentioned in section 161, the Judges not having concurred in relieving him from them under section 162.

(2) Assuming that such disqualification existed at the time of the last election, and the filing of the petition in the present suit, whether it was removed by anything in "The Election Law Amendment Act, 1884," 47 Vic. ch. 4, (O.) passed on the 25th March, 1884.

Mr. Bethune contended that there should have been one joint report of the trial Judges upon the former election petition, under the hands of both Judges, and that they had no authority to make a report and certify separately, even though they concurred in avoiding the election or in finding that a corrupt practice had been committed.

I do not think this argument is entitled to prevail. The Act of 1884, sec. 10, no doubt now expressly requires (following the English Act of 1883,) that "in case of a trial before two Judges, every certificate and every report sent to the Speaker shall be under the hands of both Judges;" but as the law stood when the first petition was determined, I think it is impossible, looking at the loose and inaccurate way in which the expressions "report of a Judge," sec. 158, ch. 10: "report of the Judge:" section 161, ch. 10: "his or their report," sec. 59, ch. 11: "Report or reports, (if any) of the Court, Judge or Judges:" section 60: are used, to say that their joint decision under section 38, or their finding under section 161, might not be

evidenced by two reports, each under the hand of one of the Judges.

There is more room to argue that the certificate under section 55 of the result of the trial should have been a joint one under the hands of both Judges. I consider, however, that this objection is not open to the respondent, who by becoming a candidate at the election now in question must be taken to admit that the former election was on some ground or other regularly set aside. But whatever view may be taken as to the certificate, I think the Judges were at liberty to make separate reports. These reports ought to be read and taken together. We should not criticise and dissect them as if they were special pleadings, but should endeavour to ascertain what meaning is fairly attributable to the language employed.

So reading them what do we find.

The 161st section of the Election Act provides that "when it is found by the report of the Judges * * that any corrupt practice has been committed, by or with the actual knowledge or consent of any candidate or at an election," certain results shall follow.

The trial Judges at the former election concurred in avoiding it, and, as appears from their reports, for the same act, namely, the payment by the respondent of the travelling expenses of certain voters.

Mr. Justice Cameron certified that he and his colleague differed as to whether the respondent was guilty of a corrupt practice under section 161; and I may say here that I cannot quite agree with an observation in the judgment of Mr. Justice Burton that the reference to that section is inaccurate. It is plain that what is meant is, that they differed as to whether the respondent was guilty of a corrupt practice committed with his actual knowledge and consent, that is, committed in such a way, or in such circumstances as section 161 speaks of. The next clause of the report shews the nature of the corrupt practice, viz., the paying, or the consenting to the payment of the travelling expenses of voters. The learned Judge then certifies

that the respondent was proved guilty of such corrupt practice, which is to my mind clearly described as one of those prohibited by section 154 of the Election Act.

I now turn to the Chancellor's certificate, which I think describes quite as distinctly as the former, the offence and its personal character. He finds that the respondent committed an illegal act under section 154, in sanctioning, which is equivalent to authorizing, ratifying or confirming, the payment of voters' travelling expenses at the election, language which is quite inconsistent with the idea that the offence was committed by an agent or otherwise than with actual knowledge and consent. The other or excusatory part of his report also shews that he was dealing with a personal act.

It was useless to try to escape from the consequence of that finding by calling it an illegal act, when the law calls it a corrupt practice; and so the learned Chancellor felt when he gave effect to it as such by avoiding the election. He says, however, that he differed from his colleague as to whether the respondent was guilty of a corrupt practice under, that is—as I have pointed out—within the meaning of section 161. But the other part of his report shews that he meant to say that, though compelled to find the respondent personally guilty of what the law calls a corrupt practice, and therefore to avoid the election, he did not think the disabilities attaching to such act under section 161, should be affixed to it, because it was committed under the circumstances mentioned in section 166.

I cannot agree that the respondent is now at liberty to contend that the expressions made use of by the learned Chancellor, in what I have called the excusatory part of his report, are to be looked at as shewing that he was not in fact guilty of a corrupt act. The judgment or decision that he *was* guilty of it, is still "in full force and unreversed;" and has been accepted and acted upon by the legislature and by the respondent.

If the reasons given by the Chancellor for thinking that he ought to be relieved from the consequences of the act

are to be accepted for the purpose of shewing that he had not really committed it, the judgment avoiding the election was wrong. If the respondent had appealed, it might have been reversed; but on the other hand it might have appeared from the evidence that the judgment was right though the reasons assigned for it were wrong or non-existent. So I think we cannot look at anything which the learned Chancellor has unnecessarily said about the corrupt practice in his reasons for giving the respondent the benefit of section 166.

I am therefore of opinion, adopting the language of Grove, J. in *Grant v. Overseers of Pagham* 3 C. P. D. 80, at p. 85, that the reports of the trial Judges at the former election "unambiguously and necessarily involve a finding, according to the statute," that a corrupt practice had been committed by or with the actual knowledge or consent of the respondent; and as they did not concur in relieving him from the consequences which attach to such finding, he was in point of law disqualified to be a candidate and incapable of being elected at the last election.

I think the case of *Grant v. Overseers of Pagham*, *supra*, is entirely distinguishable from the present case for the reasons mentioned in the judgment of the learned trial Judges, and by my lord.

The next question is, whether the respondent has been enfranchised by the recent Act.

I agree with Mr. Bethune that unless the disqualification is removed as regards the last election, it still exists.

The 48th section is relied on, but it cannot be said to have fulfilled the professed object of its existence, which is, to remove doubts.

It declares that it has been and is the policy of the election law, and the intent and meaning of the several statutes in that behalf, that no candidate is disqualified for any corrupt practice without *the concurrent judgment to that effect* of the two Judges by whom the election petition is tried.

It is argued that this shews that the Judges must pronounce, and should always have done so, a concurrent judgment of disqualification, and not merely find the existence, &c., of corrupt practice. But the declared intention and meaning are quite repugnant to the language of the Legislature, for by no statute are the Judges, or either of them, authorized or required to pronounce a judgment disqualifying the candidate. They can only find and report as to the commission of corrupt practices, and it was always necessary that they should concur in doing that. This part of the section seems, as Mr. Justice Burton observes, to have been penned by some one unfamiliar with the existing state of the election law. The last clause of the section, which deals with another subject, is more accurately phrased, and speaks of corrupt acts set up and proved, and *so adjudged* by the two Judges *as by law to involve* disqualification, &c. Section 30, amending section 166, also shews that what is meant is a finding as to the acts charged, not a judgment of disqualification. Taken as a whole, it is impossible to say, particularly as the doubts intended to be removed are not indicated, that in this respect the section attributes any other intention and meaning to the existing statutes than that which their language has hitherto always been taken to imply—namely, that there must be a concurrent finding or report that a corrupt practice has been committed.

The respondent is, therefore, not rehabilitated by the earlier part of the section.

The next clause provides that this, that is, the concurrent judgment of the two Judges, applies to section 162 of the Election Act, and the conditions and circumstances therein mentioned, as well as to other matters on which corrupt practices or their consequences in any way depend. I do not see how this clause aids the respondent. The concurrent judgment of both Judges was always necessary, as well to find corrupt practices proved, as to relieve from their consequences, and here the Judges did not agree to do the latter. The clause is

declaratory of the existing law, but is inconsistent with section 29 of the same Act, which amends section 162 by providing that one Judge may relieve from disqualification.

The last clause of the section has been incidentally alluded to for another purpose ; but I refer to it again as it is relied upon as being specially applicable to the respondent. Reading it with the first part, it declares the law to be that in case of an election being set aside, and a new election had to the same Legislative Assembly—(which is the case before us, though it occurred before the Act was passed)—the new election cannot be avoided by setting up corrupt acts &c. of the candidate in or during the former election, or affecting the same, which were not set up and proved at the former trial and so adjudged by the two Judges or by the Court of Appeal before the subsequent election, as by law to involve such disqualification, &c.

It follows from what has been already said that this clause cannot apply to the respondent as the corrupt practices for which the new election has been avoided *were* set up, and *were* so adjudged at the trial, as by law to involve such disqualification.

It is worth noticing that while this clause is prospective in its terms, and speaks of disqualification resulting from the decision of the Court of Appeal, section 10, sub-sec. 6 of the same Act enacts that there shall be *no appeal* from a decision of the Judges finding that a candidate has not been guilty of corrupt practices.

I am therefore of opinion that the respondent has not been enfranchised by the recent Act, and that his appeal should be dismissed.

As regards the petitioner's appeal, I am very much disposed to think that we are in effect saying that notice of disqualification can only be effectually given by giving it to each voter as he comes up to the poll, yet looking at the large majority obtained by the respondent, one ought to be morally convinced that the notice was brought home to the knowledge of the voters before venturing to seat the minority candidate.

I cannot say there is not some doubt on that point ; and therefore do not see my way to differ from the view taken by the trial Judges and by the other members of this Court.

MORRISON, J. A., concurred with OSLER, J.A.

PATTERSON, J. A.—The election which is immediately in question was in January, 1884, the nomination day being the eleventh, and the polling day the eighteenth of that month. The respondent, John Francis Dowling, received a majority of the votes cast, and his return is attacked upon the ground that at a previous election, held in February, 1883, for the same Electoral District for the same Legislative Assembly, at which he was a candidate, he had been guilty of a corrupt practice.

Section 166 of the Election Act enacts that “To remove doubts as to the effect, upon subsequent election, of the avoidance of a prior election held for the same Electoral District for the same Legislative Assembly, * * such subsequent election shall be deemed and taken, as respects both candidates and voters, to be a new election, in law and in fact, to all intents and purposes, except as to the personal acts of the candidates, and the acts of agents of candidates done with the knowledge and consent of such candidates.”

Section 158 makes an election void (unless saved by section 159), where it is found upon the report of the Judges before whom the trial of an election petition has been conducted, “that any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate ;” and section 161 adds, “that when it is found by the report of the Judges upon an election petition that any corrupt practice has been committed by or with the actual knowledge or consent of any candidate at an election, in addition to his election, if he has been elected, being void, he shall, during eight years next after the date of his being so found guilty, be incapable of being elected to and sitting in the Legislative Assembly, and of

being entered in any voters' list as a voter, and of voting at any election, and of holding any office at the the nomination of the Crown or of the Lieutenant Governor in Ontario, or any municipal office."

The very severe penalties thus attached to conviction of "*any corrupt practice*,"—a term which under the Election Act of Ontario includes acts which are free from any intentional corruption, and which may be incapable of influencing a single vote—may be in some circumstances averted from the candidate by the provisions of section 162. These penalties are, however, something added to the avoidance of the election which is worked by section 158.

For the purpose of the present contest, inasmuch as section 166 does not enable this respondent to treat the election of January, 1884, as a new election, the petitioner was not driven to rely upon section 161 ; but, if he was able by any proper evidence to bring home to the respondent a corrupt practice committed at the election in February 1883, he would have done enough to avoid the present election; and the curative effect of section 162, which is addressed only to the ulterior disabilities imposed by section 161, would not come in question.

The petitioner has not offered substantive evidence of the commission of the alleged corrupt practice, but has relied upon the certificates and reports of the rota Judges before whom the petition against the February election was tried.

The present petitioner was petitioner, and the present respondent was respondent upon that occasion. Whatever the rota Judges certified or reported under sections 55 and 58 of the Controverted Elections Act, R. S. O. ch. 11, may perhaps be *res judicata* between these parties, so as to enable the certificates or reports to be used on this trial as evidence of facts which, under section 158, avoid an election. That use of them, if admissible, must depend upon the accident of the parties being the same to both proceedings, and upon the propriety of regarding the reports as adjudications between these parties.

The effect given by the statute to the report of the Judges by which a corrupt practice is found against a candidate is, under section 158, to avoid the election to which the report relates, and under section 161, to disqualify.

The statute does not profess to make the report evidence for any other purpose, and, except in a case where, in a contest respecting a second election for the same Legislative Assembly, it is desired to avoid the second election by a corrupt practice committed at the first, section 162 *non obstante*, a petitioner will seldom, if ever, have any object in claiming for the report any other effect than that which section 161 expressly declares it to have.

I do not apprehend that in the present case any such necessity arises; but, if it should arise, I should desire to give the matter more consideration before deciding that, even as between the parties to the petition, the report can properly be used for any purpose beyond that dealt with in sections 161 and 162.

The certificates relied upon as evidence were proved by copies certified by the clerk of the Legislative Assembly to whom the originals were addressed. One certificate was signed by the Chancellor and the other by the present Chief Justice of the Common Pleas, who as *rota* Judges, had tried the petition.

One paragraph, which was the same in each certificate, was the following: "And in further pursuance of the said Act, I certify that we, the said Judges, differed in our judgments as hereinafter set forth, although we both agreed that the said election should be avoided with costs to be paid by the said John Francis Dowling."

This statement appears to have been accepted as certifying, under section 53 of the Controverted Elections Act the determination of the Judges that "the election was void," and to have led to the issue of the writ for the second election; and no question respecting it arises at present in any direct way.

Section 58 requires that "where any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the Judges shall, in addition" to the certificate under section 55, "and at the same time, *report* in writing to the Speaker as follows: (a) Whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any and which candidate at such election; and the nature of such corrupt practice."

This is the *report* spoken of in sections 158 and 161 of the Election Act; and the petitioner has to maintain that, in the documents produced from the office of the clerk of the Legislative Assembly, the two rota Judges reported that a corrupt practice had been proved to have been committed by or with the knowledge and consent of the respondent, and the nature of such corrupt practice.

There is no report from either of the learned Judges in the words of the statute; but it is contended on the part of the petitioner, that each of them has certified something which amounts to a report that a corrupt practice had been proved to have been committed by or with the knowledge and consent of the respondent.

I do not suppose it to be essential, in order to comply with the direction to report in writing to the Speaker, that the word "report" shall be employed. Any statement in writing of the necessary facts, will, of course, suffice, and will be a report. Nor am I prepared, at present, to assent to the suggestion made by counsel that, under the law as it stood when these certificates were given, the requirement that the Judges should report, or should certify, could only be satisfied by their making a joint report and not two separate reports. But while the joint finding, to which alone the statute gives any effect may, as I assume, be evidenced by two separate reports, it ought to clearly appear, from the reports themselves, before they are taken to shew a joint finding, that they both relate to the same charge or the same state of facts.

I shall now notice the reports separately, first remarking that in neither of them is it stated that the act or acts for which the election was declared void are those about which the present contest has arisen; and we are of course aware that the avoidance of an election does not of necessity imply the commission of any corrupt act by a candidate or by any one else with his knowledge or consent.

The statement of the learned Chancellor is as follows :

“ And, in further pursuance of the said Act, I certify that we, the said Judges, differed in our judgment as to whether the said candidate, the respondent, was guilty of a corrupt practice under section 161 of the Election Act. And I, the said John Alexander Boyd, for myself, certify that the said respondent committed an illegal act under section 154, in sanctioning the payment of voters’ travelling expenses at such election, but without any corrupt intent, and in ignorance, which was involuntary and excusable, under a belief that, so long as he did not personally bear or pay the said expenses, it was not illegal; and under the further belief that the said voters were bound or were willing to repay the said expenses, or allow them to be deducted from their wages.

“ And I further certify that the evidence showed the candidate to have honestly desired, and in good faith endeavoured, as far as he could, to have the said election conducted according to law.”

Is this an adjudication of the offence in respect of which the very severe penalties of section 161 are incurred?

It is not a question of what it is possible to infer, and even reasonably to infer, from the language as we read it, may have been the opinion of the learned Chancellor. Different minds may draw different inferences; but, apart from that, the disqualification results not from the Judge’s opinion but from his report.

The operative words here are “that the said respondent committed an illegal act under section 154, in sanctioning the payment of voters’ travelling expenses at such election.”

Section 154 declares that "the hiring or promising to pay or paying for any horse, team, carriage, cab, or other vehicle by any candidate, or by any person on his behalf, to convey voters to or near or from the poll, or from the neighborhood thereof, at any election, or the payment by any candidate, or by any person on his behalf, of the travelling and other expenses of any voter in going to or returning from any election, shall be illegal acts; and the person so offending shall thereby incur a penalty of \$100." And it further forbids under the same penalty, in addition to disqualification from voting at the election, the hiring of any horse, &c., by any elector for any candidate or any agent of a candidate, for the purpose of conveying voters to or from the polling places. All these acts, under both branches of the section, come under the definition of "corrupt practices" in the interpretation clause.

This certificate does not, in terms, find a corrupt practice proved, nor does it find the acts which are described in either branch of the section. The second branch of the section cannot be surmised to have been in the contemplation of the learned Chancellor; because what he says relates only to the payment of voters' expenses. He does not say that these expenses were paid by the candidate or by any person on his behalf. If he considered that the evidence proved a payment of that character, he has left his opinion to be inferred. But, even if we should be justified in drawing that inference, it would not follow that the payment was made by him or with his knowledge and consent. His *sanction* may have been merely ratification, after the election, of what he may have known nothing of till then.

I remember a case which I tried, where it was proved that a number of Canadians, who were lumbering in Michigan for an elector of this Province, came to their homes to vote, their travelling expenses being advanced to them by the foreman of their employers and charged to their accounts. I do not think an employer would offend against section 154 by ratifying or sanctioning the act of his foreman when it came to his knowledge for the first

time after the act had been committed, and after the election.

Such a state of facts as this would satisfy all that is necessarily imported by the Chancellor's certificate; and we know nothing of the facts beyond what we gather from that document.

It is, in my opinion, impossible to treat this certificate as the report which is prescribed by section 58 of the Controverted Elections Act, and as amounting to a conviction of the respondent of a corrupt practice committed by a violation of section 154 of the Election Act by him or with his knowledge and consent.

If I am right in this opinion, it is not necessary to examine the certificate of the learned Chief Justice; but I ought not to pass without notice the objections taken to it as evidence for the purpose for which it was used.

It is in these words:—

“And, in further pursuance of the said Act, I certify, that we, the said Judges, differed in our judgments as to whether the said John Frances Dowling was guilty of a corrupt practice, under section 161 of the Election Act, in paying, or consenting to the payment of the travelling expenses of certain voters to convey them to the poll; and I, the said Matthew Crooks Cameron, for myself, certify that the said John Francis Dowling was proved guilty of the said corrupt practice.”

This comes more nearly to the language of section 154. It can be understood to find, without ambiguity, that the respondent either paid or consented to the payment of the travelling expenses of certain voters to convey them to the polls. The payment of such expenses is, however, no offence, unless made by the candidate or by some person on his behalf. A payment, for example, at the request of the voter himself by one who neither knew nor cared for whom the voter intended to vote, or whether he meant to vote at all, would, I apprehend, be no offence, and a candidate would incur no penalty for consenting to such a

payment if he happened to know of it. It would not be made on his behalf.

But if we assume the offence to be sufficiently described to bring it within section 154, we have after all only an alternative description—a payment by the candidate or a payment by some one else consented to by the candidate. It is truly urged that in either form the offence comes within the section; but it is equally true that, if it were possible to identify either with the act alluded to by the Chancellor, it is impossible to indentify both; and therefore, as it is impossible to say which offence the learned Chief Justice considered proved, it does not appear that there is a joint finding upon any one charge.

The petitioner is not helped towards the conclusion which he has to establish by the circumstance that the two learned Judges concurred in avoiding the election, because, as I have already pointed out, they do not state for what cause they avoid it, or give room for more than a surmise that their judgment in that particular may have rested on any violation of section 154.

I have not thought it necessary to cite authority for the principle on which I have dealt with the evidence. But as one of the learned Judges who tried the petition has referred to the case of *Grant v. Overseers of Pagham*, 3 C. P. D. 80, and, as that case has been cited to us on the argument, I may say that I think that decision is a direct authority for assuming nothing in aid or in extension of the report actually made by the Judges. The report in question there was made under the provision of the English statute which is followed in our section 58. It stated "that the said Albert Grant was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act, 1854; and I further report that the nature of such corrupt practice was the promising before and at the time of the election to certain voters for the said borough of Kidderminster, and other inhabitants thereof, that the said Albert Grant would in the event of his being elected at the said election, and after

such return, give to such voters and other voters and inhabitants of Kidderminster an entertainment, consisting, amongst other things, of meat and drink, with a view and intent to induce such voters to vote for him the said Albert Grant at such election."

It was held that this was not a report that a corrupt practice had been committed by the candidate, or with his knowledge and consent.

Under the English Act where the expression is used, which does not occur in ours except perhaps in section 152, "guilty by himself or his agents," a candidate may, within the terms of the statute be guilty of a corrupt practice committed by an agent without the candidate's knowledge or consent. The decision in *Grant v. Overseers of Pagham*, 3 C. P. D. 80, turned upon this consideration, inasmuch, as consistently with all that was stated in the report, the corrupt practice might not have been committed by the candidate personally or with his knowledge and consent. Even the corrupt promise reported was not said to have been made by the candidate.

It seems to me that the reports before us do not require to be read with nearly so great strictness to make it plain, as I have endeavoured to point out, that they fall short of what the statute requires before a disqualification is worked. But it is noticeable also that if it were permissible to aid the language of the report by speculations or conjectures however plausible, of what the Judge who made it must have intended, there were as fully as strong grounds for that process in the English case as in the present one. The report, it will be remembered, was made in obedience to the provision the object of which is to bring to the notice of the Speaker the names of the individuals to whom corrupt practices have been brought home. It might well have been argued that as the report of a practice which was only constructively and not personally committed by a candidate and not known or consented to by him would be foreign to the object of the section, the rota Judge must have meant that the corrupt practice

which he reported was one of the nature of those he was directed to report—namely, personal bribery. Whether such an argument would have been used or not if counsel had been heard in support of the disqualification, which happened not to be the case, we cannot say. If it had it would probably have been met by the same observation which Grove, J. made when discussing the report: “It may be,” he said at p. 85, “that the learned Judge had in his mind when he found, as he does, that the said Albert Grant was guilty of a corrupt practice at the said election within the true intent and meaning of the Corrupt Practices Prevention Act, 1854, that he had been personally guilty; but he does not find so; he does not use the words of the Act of Parliament; nor does he use words which unambiguously and necessarily involve a finding according to the Act of Parliament.”

I am unable to distinguish that case in principle from that before us. Unless I misunderstand it and the statute under which it was decided, the report was simply futile, as it could have no effect at all unless it affected some one personally. That consideration, however, was not sufficient to cause it to be treated as stating, for the purpose of disqualifying the candidate, anything more than what plainly appeared on its face.

In my opinion the petitioner failed to prove any corrupt practice committed by or with the knowledge and consent of the respondent at the election of February, 1883, which would avail him at the election of January, 1884, under sections 158 and 166; and also failed to prove such a report as would disqualify the respondent under section 161; and this appeal of the respondent should therefore be allowed with costs; the petitioner's appeal dismissed with costs; and the petition dismissed, with costs.

Both appeals dismissed.

G. F. H.

WELLAND.

PROVINCIAL ELECTION.

BEFORE PATTERSON, J.A., AND FERGUSON, J.

WELLAND, July 3, 4, 5, 6, and 7, 1883.

TORONTO, September 8 and 29, and December 15, 1883.

WELLAND, December 26, 27, and 28, 1883.

TORONTO, December 29, 1883, and January 16, 1884.

GEORGE LAMBLOW HOBSON, *Petitioner*, v. JAMES E. MORIN,
Respondent.

Meetings of party association for constituency—Other meetings—Membership—Corrupt practices—Agency—Treating—Payment of voters' travelling expenses—Bribery—Corrupt act in connection with illegal practices—Trifling extent of—Result of election not affected thereby—Election Act, sec. 150, R. S. O. ch. 10—Costs—Sec. 160.

A Reform association existed in the constituency as an organized body for bringing forward candidates and doing everything in their power to elect their nominees. B. was present at meetings of the association, and one witness swore, "he took as much part as any of us." It was not shewn that the organization was well defined, or what was necessary to constitute membership. A committee and sub-committees were appointed for the township in which B. resided, but he was not on them, or any committee for election purposes. Committee meetings were held at his hotel at which he was present, but it was not shewn that he did any more at the meetings than any owner of a hotel would do at a meeting held in his house. B. swore that, with the exception of one man, he did no canvassing outside his own house; he did not report to the committee meetings in his house, because he had been doing nothing, but that he gave the respondent the name of one person who wished to see him. It was not shewn that he had any authority from the respondent, or any committee, or that the respondent expected his assistance, or gave him any instructions, or recognized any act done by him. At the trial, it was proved that B. had been guilty of a corrupt practice, without the knowledge or consent of the respondent.

Held, following the *North Ontario Case*, H. E. C. at p. 323, that B. was not an agent of the respondent.

D. heard of a meeting, went there, and found about half a dozen people present going over a voters' list, in which he did not take part. It was not shewn that he had any authority from the respondent, or any committee or association, or any one on his behalf, or that any act he did was recognized. D. was found to have been guilty of corrupt practices without the knowledge or consent of the respondent.

Held, following the *North Ontario Case*, H. E. C. at p. 317, that he was not an agent.

At the trial of the petition one corrupt act, namely, the payment of the travelling expenses of a voter M. by F., an agent of the respondent, was proved; it was also found that C. D. was guilty of bribery, in giving a dollar to each of two voters and offering money to another, but no agency was proved, and that L. B. gave liquor at his tavern during polling hours, but he was not proved to be an agent. It was contended that these latter acts, and the evidence as to the acts and conduct of three other parties in connection with other charges which were not proved, should all be taken into consideration with the proved corrupt act, in order to take the case out of sec. 159 of the Election Act, R. S. O. ch. 10, and prevent the respondent from saving his seat under the provisions of that section.

Held, that the election was not avoided.

Per PATTERSON, J. A. The "result" referred to in sec. 159 is the result which touches the right to the seat which is being contested, *i. e.*, the majority of legal and honest votes. The petitioner could not insist on giving evidence of any corrupt practice which he has not charged—and for this purpose illegal acts are corrupt practices—but whether the evidence given upon any charge is sufficient to establish it, or falls short of doing so, any facts or any course of conduct shewn by that evidence may be properly considered in connection with any other corrupt or illegal practice which has been proved, and the nature or probable extent of which it may serve to elucidate; but on consideration of all the facts in this case, this election should be held good and the respondent duly elected.

Per FERGUSON, J. The words "other illegal practices at the election," at the end of sec. 159, must be illegal practices the existence of which is ascertained and known, and the way their existence becomes known is by the evidence. This cannot rest in conjecture, it must be proved. Whenever, in giving evidence to prove a corrupt practice charged as having been committed by an agent, it appears that illegal practices took place, though the evidence fail to prove the agency, these illegal practices are comprehended in the meaning of the words "other illegal practices at the election," and must be taken in connection with the corrupt act of the agent. On the whole case, the corrupt act proved was so trifling that the result cannot have been affected by it, either alone or in connection with the other illegal practices at the election; the election should not be avoided.

Held, also, although the respondent was duly elected, the costs did not follow this event, but, under sec. 160, as if the event had been the setting aside of the election: the respondent paying the general costs, including full costs which would have been taxable, if the only charges had been those on which the petitioner had succeeded, the latter being deprived of costs in respect to the charges on which he failed, the respondent bearing his own costs of those charges.

THE petition contained the usual charges of corrupt practices. Particulars of seventy-seven charges were given previous to the trial, and on the first day of the trial leave was given to furnish further particulars.

Some of the charges were abandoned, and most of those on which evidence was taken were dismissed at the trial.

On charge No. 26, the evidence of one Robert Chaffey shewed that on the day of the election, and after he had voted, he went to the hotel or tavern of Luther Boardman and wanted something to drink. Boardman told him he could neither give nor sell drink, but that if he would go back to the kitchen perhaps he could get a cup of tea or something. He went into the pantry. He saw a bottle there, and that was what took him in there (he got a drink of whiskey out of the bottle); but did not see any tea there.

Boardman swore that he did not know, until lately, that there was any whiskey in the pantry and did not know why it was put there. Chaffey came in on election day and asked for liquor, and he was told he could only get tea or coffee.

McCarthy, Q.C., for the petitioner.

S. H. Blake, Q.C., R. Harcourt, and T. D. Cowper, for the respondent.

September 29, 1883. FERGUSON, J.—Charge No. 26 is, selling and giving liquor by L. Boardman to Chaffey and others on 27th February (the polling day). An amendment necessary to bring this within the meaning of sub-sec. 6 of sec. 2 of the Controverted Elections Act, R. S. O. ch. 11, and sec. 157 of the Elections Act, R. S. O. ch. 10, was made: and we find upon the evidence that L. Boardman did, at his tavern, within the limits of a polling sub-division, on the polling day therein, and during the hours appointed for polling, give spirituous liquor to said Chaffey. The giving of judgment as to the agency or not of L. Boardman is postponed pending the judgment of the Court of Appeal in another case. There is no evidence to shew that the act was done with the knowledge or consent of the respondent.

On charges Nos. 45 and 46, the following judgment in which the facts are stated was also delivered on the same day:

FERGUSON, J.—Charge No. 45 is, the payment of money by Caleb Doane to John Wagner to vote for the respondent; and charge No. 46 is, the payment of money by Caleb Doane to Jacob Wagner to vote for respondent. We find upon the evidence that Caleb Doane did pay to each of these persons, John Wagner and Jacob Wagner, a small sum of money to induce them to vote for the respondent. The giving of judgment as to whether or not Caleb Doane was an agent of the respondent is postponed pending the judgment of the Court of Appeal in another case. There is no evidence to shew that these acts were done with the knowledge and consent of the respondent.

Subsequently judgment was delivered on the question of agency.

December 15th, 1883. FERGUSON, J.—By a former judgment in this case, it was found as a fact, that Luther Boardman did, at his tavern, within the limits of a polling sub-division, on the polling day therein, and during the hours appointed for polling, give spirituous liquor to one, Chaffey, and that Caleb Doane did pay to each of the persons, John Wagner and Jacob Wagner (they being voters), a small sum of money to induce them to vote for the respondent; and it has become necessary to determine whether or not the said Luther Boardman and Caleb Doane were agents, or either of them was an agent, of the respondent.

It was shown that there existed what was called a Reform Association for the county of Welland. The witness, James Henderson, said that he had been connected with this association from 1852 or 1853. He said it was an organized body for bringing forward candidates, and when a candidate was brought forward, to do all in their power to have him elected. He said Boardman was present at meetings of this association, and took, as he put it, “as much part as any of us.” He said that at these meetings, or some of them, resolutions were passed to the effect that all reformers present might vote. From the evidence given, it was (to

me) somewhat difficult to understand what constituted membership in the Association, or whether or not membership extended to all reformers in the county who saw fit to attend the meetings.

The organization spoken of by the witness did not appear to be a well defined thing, and I am strongly inclined to think that it was very imperfect, and not such an organisation as that mentioned by Mr. Justice Gwynne in the *East Northumberland Case*, H. E. C. 387, or one doing its work at all in the same way.

A committee and sub-committee were appointed for the township in which Boardman resided, but he was not upon any of these committees, nor so far as appears, upon any other committee for election purposes.

Several committee meetings were held at Boardman's house, which was an hotel or tavern, and he was present at some, if not all of them. There were as many as three or four of them. Henderson says that Boardman was not one of the committee, and might have been expelled from the meetings. He also says that he (Henderson) cannot say that Boardman did more at these meetings, or any of them, than any owner of a hotel would do at a meeting held in his house. He says that no duty was assigned to Boardman, and he could not say that he did anything in particular, but that he seemed to take as much interest as any one. The same witness, in another part of his evidence, says that Sibbitt and Collins were named as persons that Boardman might influence, but he could not say that Boardman was to go, or promised to go, and see these persons or either of them.

Boardman says that, excepting going to see one, Raap (who, if I recollect rightly, was an alien, and had no vote), and in his own house, he did no canvassing. He says that three or four meetings were held in his house, that he did not report to these meetings or any of them what he had been doing because he had been doing nothing. He says he thinks there were some persons who had not seen the respondent, and who desired to see him, and that he

told the respondent this, and gave him the name of one person.

There was evidence tending to show that Boardman had much influence on municipal matters, and that in such matters a party called the "Boardman party," was a strong party. There was a good deal of evidence given with respect to the position of Boardman in reference to the election. Much of this was in relation to the resignation of a license commissioner and the supposed reason for it, which did not seem to me very pertinent or material. I think, however, that the whole of the evidence on the subject did not show the position of Boardman to be materially different from what it appears to be from the parts to which I have referred. In the contention that Boardman was shown to have been an agent of the respondent, the *East Northumberland Case*, to which I have already referred, was, amongst others, relied on.

Boardman was not upon any committee. He was not a canvasser. It is not shown that he had any authority from the respondent, or from any one on his behalf, or from any committee, or from the Association, to constitute an agency. It is not shown that the respondent expected or claimed to be entitled to his assistance, or that he recognised any act done by him, or gave him any instructions or even any caution such as was given in the *North Ontario Case* H. E. C. 324, or such as in this case was shown to have been given to Tookey and Flynn.

The respondent did not accept the nomination tendered him by the convention for some time afterward, and he did not, and could not then, have given the members of it any authority or instructions to solicit votes for him, and it does not appear that he did so or had any opportunity of doing so afterwards.

In the *North Ontario Case*, H. E. C., at p. 323, Chief Justice Wilson is reported to have said, "I cannot do better, after reading most of the law on the subject, than accept as my principal guide, as to what will constitute agency, the rules of Mr. Justice Grove in the *Taunton Case*, 2 O. M. & H.

66, and inquire whether the candidate or his agent did employ the person whose conduct is impugned to act on his behalf or did, to some extent, put himself in such person's hands, or, did make common cause with him for the purpose of promoting the election; and in the *Wakefield Case* (2 O'M. & H. 200) when the same learned Judge uses the like language, of the candidate placing himself or allowing himself to be in the hands of certain persons, or making common cause with them.

Adopting these rules here, and they seem to be very sensible and comprehensive, I do not perceive how I can fairly, on the evidence, arrive at the conclusion that it has been shown that Boardman was the agent of the respondent, and I am of the opinion that such agency has not been established.

As to Caleb Doane, it was argued that he attended a meeting, and thereby became, or was shown to have been, an agent of the respondent.

Caleb Doane, in his evidence says that Francis Augustine told him of a meeting at the Humberstone school-house, and that he went there, that there were there about a half a dozen people; that they had, he thought, a voter's list, or more than one, that he himself had not any list in his hand, that he might have seen the others "at the lists" but he did not hear them go through any of it. It is not shown that Caleb Doane was active or did much work of any kind at the election, but in doing the little that he did do he went wrong. It is not shown that he had any authority from the respondent, or from any one on his behalf, or from any committee, or from the Association, or that there was any recognition in any way of any act that he did. There is simply the fact that, in the way he tells it, he attended this meeting.

In the *North Ontario Case*, H. E. C., at p. 317, it is said, "A person upon a committee, but not shown how he got there or what he was to do, who wrote a letter offering to pay a voter's travelling expenses was held not to be an agent." And the passage from the judgment of

Bramwell, B., in the *Windsor Case*, (2 O'M. & H. 88) is referred to, which is in these words, "If we were to hold this man to be an agent it would make the law of agency, as applicable to candidates, positively hateful and ludicrous."

If I adopt this in conjunction with the rules before alluded to which were adopted by Chief Justice Wilson as his principal guide in the *North Ontario Case*, *supra*, and so far as I have been able to see from a perusal of many authorities upon this somewhat puzzling question of agency in election cases there are no better rules to adopt, I do not see how I can arrive at the conclusion that Caleb Doane has been shown to have been an agent of the respondent, and I am of the opinion that it has not been shewn that he was such agent.

I am therefore of the opinion that it has not been proved that either Luther Boardman or Caleb Doane was an agent of the respondent.

Charges Nos. 48 and 49, the payment of money for travelling expenses by agents of the respondent to one John Mahagan, a voter, were found proved on the evidence; but it was also found that the act done was without the knowledge or consent of the candidate.

The question then to be decided was, whether, under sec. 157 of the Elections Act, the corrupt act proved to have been committed by an agent, without the knowledge or consent of the candidate, was of such a trifling nature that the result could not have been affected thereby, either alone or in connection with other illegal practices.

On this point, both the learned Judges gave the following judgments:

January 16, 1884. PATTERSON, J. A.—We have, during progress of this trial, disposed of a number of the charges of which particulars have been given, by holding that the petitioner failed in his attempt to establish them by proof, and we have held that as to some other charges he had

been more successful. One of these was, a charge of the violation of sec. 154 of the Election Act by the payment, on behalf of the respondent, of the travelling expenses of one Mahagan, a voter at Stonebridge, in returning from the poll at that place to a place in the United States, where he worked. The agent by whom this corrupt act was committed was one Flynn, of whom we do not hear in connection with any other charge, or one Twohey, from whom the money actually came, and whose name does not again occur in the evidence as doing anything about the election.

We also found that one Caleb Doane was guilty of bribery by giving a dollar to each of two men named Wagner to induce them to vote for the respondent, and of offering money, though not any definite sum of money, to one Martin Morningstar for the same purpose ; but we did not find that Doane was an agent of the respondent

And we held that Luther Boardman was guilty of violating sec. 157 by giving liquor, at his tavern, on polling day, and during the hours of polling, to one Chaffey.

Mahagan lived in Port Colborne. He was working at some place in Pennsylvania, and happened to be home, on account of some illness in his family, some days before the election ; and at Flynn's request, he put off his return to Pennsylvania till after he had voted. His vote was secured by keeping him in the Province ; but there is no evidence to suggest that it was otherwise influenced, or intended to be influenced, by the payment of his return fare to Pennsylvania.

The nature and extent of the acts done by Doane are shewn by what I have said of them.

In Boardman's case, the liquor was given to a person who had already voted, and who asked for it because he was cold, and who, moreover, was a supporter of the opponent of the respondent. It, therefore, neither had nor was intended to have any influence on the election, or any reference to the election.

We did not consider that the evidence which was brought

under our notice in connection with this charge was sufficient to fix Boardman with the status of agent; and the character of the act proved against him, which, though made by the statute a corrupt practice, in no moral sense savored of corruption, was not such as to tempt the Court to strain the evidence in that direction.

Another charge with which Boardman is associated has now been argued before us. It has been urged that it may still be proper to hold him to have been an agent of the respondent, and I am inclined to think that if we should adopt the view contended for, on the part of the petitioner, of the charge I allude to, the conclusion that Boardman was an agent would follow very much as a matter of course. I shall refer to this again. In the meantime, I may remark that his agency does not seem very important, since one corrupt act by an agent having been found, the question of the avoidance of the election depends on the view taken of the character and extent of such other illegal practices as have to be looked at in connection with the corrupt act so found, and not necessarily on the agency of the persons who may have been guilty of them.

The acts of Doane, and the giving of the liquor to Chaffey by Boardman have no connection with each other, and are equally dissociated from the payment of Mahagan's expenses.

Taking all these together, and assuming the utmost effect that, either by disregarding or overstraining the evidence, could be attributed to them, nothing more could be claimed than that in each case a vote may have been diverted from one candidate and cast for the other, making a difference of ten, or double the number of the votes, in the majority. The result would still be a decided majority, and so the result could not be reasonably supposed to have been affected, even on that very extreme treatment of the evidence.

If we could properly read the phrase "*affect* the result" as meaning "reduce the majority," or regard the word

“result” as embracing all the collateral consequences, such as gain or loss of prestige which might follow from the apparent popularity of a candidate as measured by the majority of votes over his opponent, we might say the result was affected wherever a vote was struck off. Mr. McCarthy cited a dictum of Mr. Justice Grove in the *Hackney Case*, 2 O.M. & H. at p. 84, where in discussing a provision (35 & 36 Vict. cap. 33, sec. 13) equivalent to sec. 197 of the Election Act of Ontario he suggested that the expression, “the result of the election,” might not necessarily mean the result as to another candidate being elected at the polls, and that, within the meaning of the section, the result might be affected by the reduction of a majority of 500 to 100. That case turned upon the question whether the election had been conducted in accordance with the principles laid down in the Ballot Act, rather than upon the inquiry whether the irregularities had affected the result, and it does not amount to a decision upon the interpretation of those words.

The observations of the learned Judge by no means convince me that the view he suggests is capable of being maintained. In my opinion the result referred to in sec. 159, which is that with which we are concerned, and I should say also in sec. 197, is the result which touches the right to the seat which is being contested—in other words, the majority of legal and honest votes.

It was scarcely, if at all, contended that the result could be reasonably supposed to have been affected by the practices to which I have been alluding; but it has been very strongly urged that there are four other charges, all or some of which we ought to hold established by the evidence; and that these charges or such of them as may be held to be established, either alone, or in connection with the illegal practices already found, must deprive the respondent of the saving effect of sec. 159; and it is further submitted that whether these charges are technically established or not, there has been, at all events, much illegality and corruption shewn, which ought to be

looked at in connection with the specific acts that have been proved, and which so regarded, makes it improper to say that the result cannot have been affected or cannot be reasonably supposed to have been affected.

One of these four charges is that the respondent promised to procure or to endeavor to procure the office of license commissioner for the county of Welland, for a person unknown to the petitioner, to induce Luther Boardman to procure or endeavor to procure the return of the respondent to serve in the Legislative Assembly.

This is a charge of bribery in the terms of section 149 of the Election Act.

There is no evidence whatever to support the charge in this shape.

The facts sought to be established are that Boardman, who keeps a hotel, was dissatisfied with a Mr. Henderson who had been for some years one of the license commissioners for the county of Welland, and desired his removal from that office, and that the respondent, in order to conciliate Boardman, who is said to have some influence at elections, promised to endeavor to procure the removal of Henderson. No one has suggested that Boardman's object was to secure the position for any particular person—what is said to have been aimed at was the getting rid of Henderson.

But while the charge, in the shape in which it appears in the particulars, is not at all pointed at by the evidence, I do not say that a charge of bribery under some of the definitions contained in sec. 149, might not be made out by proof of a corrupt agreement to procure the dismissal of an obnoxious person—and I have carefully considered the evidence with a view to satisfy myself whether it can be fairly treated as proving such an agreement or understanding.

The fact that Boardman wished to have Henderson removed is clear enough. The removal, however, not meaning dismissal but merely that he should not be reappointed after the end of 1882, when the current appoint

ment expired. The appointment is annual, and is usually made in January. It appears that Henderson, either because of Boardman's hostility, or because he could not work pleasantly with one of his colleagues, had sent in his resignation of the office in 1882, but had been persuaded to recall it. The respondent does not appear to have had anything to do with this, the communications being between Henderson and Mr. Harcourt, who represented the County of Monck but lived in Welland. It also appears that Mr. Henderson had no idea that he would be re-appointed for 1883, and that Mr. Harcourt had stated that Henderson would not again accept the appointment. Mr. Henderson was gazetted in March, 1883, which was after the election, as a commissioner for 1883, but he tells us he received no other intimation of his appointment, and as a matter of fact he never acted. Representations were made to him by some members of the Reform party, of which Henderson was himself an active member, that it would be for the good of the party that he should not accept the appointment, but this was after the Gazette had announced the appointment in March. And although the action was dictated by a desire to allay the displeasure which Boardman felt and expressed when he heard of the appointment, it is not in any way traced to the respondent or brought into connection with any antecedent promise. The utmost which we could say upon the evidence the respondent did or said about the matter was to repeat to Boardman what Harcourt had said, namely, that Henderson would not again accept the appointment.

If we could properly find on the evidence that the respondent, either in connection with this matter or apart from it, had sought to procure the active services of Boardman in promoting his election, there would, of course, have no longer been any question of the agency of Boardman, even though the conduct of the respondent stopped short of holding out to him any corrupt inducement; but I do not think the evidence respecting this subject of the license commissioners can fairly be treated either as proving an

attempt to bribe Boardman, or as adding to the other evidence relied on to shew him to have been an agent of the respondent.

Another particular charges the respondent with bribing persons named Roach and Chambers by a promise to procure a license for a hotel which Roach was buying from some members of the Chambers family. The house had been licensed for years; but, being out of repair, the inspector had not reported it for license in 1882. It was bought in March, 1883, by Roach, who succeeded in getting a license. How he managed to succeed does not appear; but we should be finding, not upon evidence, but contrary to the evidence, if we decided that the renewal of the license to this house was the result of any such corrupt act as that charged, or that the respondent had any connection with the granting or procuring of the license. The only circumstance on which even a suspicion can be founded is that Hiram Chambers, who, by-the-bye, is sworn to have had no interest in the license, wrote to one Hendershott asking him to vote for the respondent, and saying that by so doing "you will oblige *us*," which he explains to mean the respondent and him. But that, while it would be consistent with or confirmatory of evidence, if there were any, of a corrupt bargain, cannot by itself prove it.

Then it is charged that Luther Boardman bribed George Haun by a payment of money, the fact attempted to be proved being under cover of a loan of either \$3 or \$5, money was given by way of a bribe. The money is proved to have been given, and a promissory note for \$5, with the addition of fifty cents, said to be for interest, was taken. The parties to the transaction, who are the only witnesses upon the charge, tell us that the note was for money really lent, \$2 a short time before the election, and \$3 on the election day, and that it had no reference to the election. One may not feel entirely inclined to adopt the belief that the whole essence of the matter has been candidly disclosed, but that suspicion cannot be taken to satisfy the burden of proof which is upon the petitioner, and it is therefore impossible to say that this charge has been sustained.

The fourth charge involves more serious considerations. It embraces three items of the particulars, Nos. 4, 5, and 6, and is to the effect that Benjamin Upper, who is alleged to have been an agent of the respondent, was guilty of bribery by offering money to one William M. Thomas to induce him to vote for the respondent or to refrain from voting; and by offering or paying money to one Samuel McInnes for a similar purpose. That money was offered to Thomas to induce him to refrain from voting, and was refused by him, is proved by his own testimony, the truth of which there is no reason to doubt; and that the offer was made in the interest of the respondent is, I think, a reasonable inference from all the facts. It is not proved in terms by McInnes that either a payment or an offer was made to him; but it is urged that, while he, in terms, denies that he was approached in either of those forms, we ought to infer from his evidence that he was really paid ten dollars or more to stay at home and not vote. He was certainly spoken to about his vote by the same man who tempted Thomas, which is sufficient to show the activity of that man, and which, having regard to the act of bribery in the case of Thomas, makes it of little moment whether McInnes was actually paid or even actually offered money.

But the man who approached these voters was not Benjamin Upper in his own person, and nobody has been able to tell us who he was. He was a stranger in the neighbourhood. Upper had begun the day at Allanburgh town-hall where the poll was being held, and started, as he tells us, about eleven o'clock, to drive to Port Robinson. He overtook the mysterious stranger who asked him for a ride, with which request Upper of course complied. It is not likely that any one in his place would have done otherwise. The stranger was not communicative, and Upper's curiosity was so far restrained by his good breeding that he did not ask his companion who he was, or whence he came, or why, on that cold February day, he was travelling on foot on that unfamiliar road. The stranger, however, inquired where McInnes lived, and Upper was able to

inform him, although he did not know McInnes personally; and he also kindly acceded to the stranger's request to drive to the house, although going there and returning to the Stone Road, which led to Port Robinson, involved the addition of a mile to the length of their drive.

Before turning off the Stone road they met a man driving his sleigh with a load, and the stranger, asking who he was, and being told he was William Thomas, desired to speak to him. Mr. Upper obliged him by waiting while he got out of the buggy, followed Thomas, conversed with him, and returned. It was at this time the offer was made to Thomas, but Mr. Upper who sat in his buggy did not hear it. Then they drove on to the McInnes farm, the stranger maintaining his reticence as to his business with the man he was in search of, and as to the object of his incursion into the neighbourhood, as well as to his personal identity.

I was, until after the last argument before us, under what I now believe to be a misapprehension respecting the effect of the evidence concerning the visit to McInnes. I thought there was a discrepancy between Upper's statement that McInnes was not at home when the stranger called, or rather between the stranger's statement to Upper that he had not found McInnes at home, and Samuel McInnes's statement that he was in the porch cutting wood when the two drove up, and was there interviewed by his visitor. But a reference to the reporter's notes has convinced me I was mistaken, and has at the same time removed part of the impression I had formed against the honesty of the evidence given by McInnes. I now understand the facts to be that McInnes, the father, was the person sought for. He was not at home, having gone to vote, when the stranger encountered McInnes, the son, in the porch, and had with him the conversation, which, if to see him had been the object of the visit, seemed something very different from what one would have expected to hear. Samuel tells us that the stranger asked him if he had a vote and if he intended to vote, and being told by the young man that he believed he had a vote, as the people told him he had, and

that he intended to vote after his father came in, left him without any further allusion to the voting. The reason given for not voting by Samuel McInnes, may not be very satisfactory. It is that the neighbours said he had received ten dollars not to vote, and he would not undeceive them ; but it is at least consistent with his telling us that when his father returned home, not long after the men had been there, he told Samuel that the neighbours were saying this. Samuel may be speaking truth or not in telling us this, but if such a story were at that time in circulation, it could scarcely have ascribed the bribe to this visit of Upper and the other.

After these two interviews, Upper and his passenger returned to the Stone road ; but, instead of the former pursuing his journey to Port Robinson, he drove back to Allanburgh, to which place the stranger wished to return, and left him at the town-hall where the poll was being held.

The contention for the petitioner is, that these acts done by the unknown stranger must, under the circumstances, be attributed to Benjamin Upper, and that all the mystery made about the affair is only a cloak to conceal the hand of Upper who was the real actor.

I think the evidence goes a long way towards that conclusion, if it does not render it the necessary one. We have the fact that Upper, who was, to say the least, a sympathiser with the respondent, drove the stranger under circumstances which require explanation ; and we really have no explanation which commends itself to me, as proving honest ignorance of the purpose of the stranger's visit, or which satisfactorily negatives knowledge or wilful blindness. I do not think that even the proverbial presumption in favor of innocence requires us to receive the account given to us as shewing that the two men got together on this election day when the mind of each of them was full of the contest that was going on, and in which they had been each taking some part, in the casual way described, just as one wayfarer may overtake and pick up another, and

that nothing was said upon the topic of the day, and that one of them answered the other's inquiry as to one man after another—McInnes and Thomas—without referring those inquiries to the subject of the vote; and that one first went out of his way to put the other into communication with a voter, and then further postponed his visit to Port Robinson until he had returned his new and nameless friend to the scene of the polling at Allanburgh, without connecting the expedition of the stranger with the election, and without a thought as to which side was to benefit by what he so kindly aided the stranger in doing.

I am prepared to accede to this part of the argument for the petitioner, and to deduce from the conduct of Upper, which to my mind has not been explained away, the conclusion that the offer to Thomas was in effect an offer made by Upper, and that whatever took place with McInnes should also be attributed to him. I do not see my way to hold, as proved, any offer or payment to McInnes. His explanation of the possession by him, soon after the polling day, of ten dollars or more, may not have been very convincing. The father to whom he gave that money, and who is said to have brought him the report of the talk of his being bribed, was not called. Under all the circumstances it would be going too far to hold the fact to be the opposite of what the witness swears it was.

It does not seem to me of much importance whether the corrupt offer to Thomas was the act of Upper or that of the stranger alone. It was simply one corrupt act.

We are asked to find that Upper was an agent. I think for the reasons I have given with regard to Boardman, that little or nothing turns on the agency of Upper. But I cannot hold upon the evidence before us that he was an agent, without extending the same status to every one who exerted himself to any extent in forwarding the election of the respondent. There is nothing proved which strikes me as capable of being acted upon as evidence either of his appointment by the respondent or his authorized agents, or recognition of him as acting on the respondent's behalf.

There remains the important question of the application of section 157.

I never approach this subject without feeling that a task has to be undertaken, for the performance of which we have a rather indefinite rule laid down, although perhaps as definite a one as could be framed in view of the endless variety of the facts to which it has to be applied.

We have to say whether, a corrupt act having been proved to have been committed by an agent, the direct effect of which is to avoid the election, the case is one in which the trouble and expense of a new election would be unnecessary and useless; and the criterion is, if the corrupt act committed by the agent was of such trifling nature or was of such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been affected, by such act, either alone or in connection with other illegal practices at the election.

Now, as we pointed out in a judgment delivered last summer in the *West Simcoe Case*, (*ante* 128), we have not to enter upon a *quasi* scrutiny in order to satisfy ourselves of the number of votes which this or that corrupt act or illegal practice may possibly have diverted from one candidate and given to another, or may have caused to be unpolled. That course would be necessary only in case our duty was to say if the result had or had not been affected. And, if that were our duty, the precise character and extent of every illegal practice would have to be investigated and gauged. That illegal practices may, although they are not corrupt acts, affect the result, and of course affect it by adding to or taking from the votes which a candidate receives or ought to receive, is assumed by the section, and that that effect may vary with the character and extent of the illegal act may be taken as a truism.

I therefore understand the words "trifling nature" and "trifling extent" to apply to the illegal practices mentioned in the section as well as to the corrupt acts. Thus I take the meaning to be that a corrupt act of an agent, though considered in connection with other illegal practices com-

mitted at an election, shall not (if done without the actual knowledge and consent of the candidate) avoid the election, if by reason of its trifling nature and extent, and of the trifling nature and extent of the other illegal acts, the result cannot be reasonably supposed to have been affected. The difficulty I feel is in forming a satisfactory judgment as to the limits intended for the inquiry respecting illegal practices. Are we confined to such illegal practices as have been specifically proved ; or are we intended to take into account practices which there may be reasons more or less strong for suspecting, but which are not proved ? And if our attention is to be restricted to those which are proved, must they not also be charged in the petition and specified in particulars, if particulars are ordered to be given ?

In the *West Simcoe Case*, *supra*, in which we held that the seat was not saved by section 159, the circumstances did not call for an answer to these questions. The corrupt act there found was a breach of sec. 157 by selling or giving spirituous liquor within the hours of polling, a practice which had been continued the whole day, without any regard to the prohibition, and of which therefore it was not possible to state the extent or to say it was trifling.

The same thing may be said of the *Lincoln Election Case*, in the decision of which I took part some years ago, and in which the illegal practice was bribery, under the provision now found in sec. 149 (e), by advancing money to be spent in bribery, H. E. C. 493, 494, 497, 498.

Yet in each of these cases, if the result was affected, it must have been by a series of acts, no one of which was specifically proved. In the one case by giving liquor to a number of persons, and in the other by distributing the money among many individuals.

The opinion which one is naturally inclined to adopt is that while the *onus* is upon the respondent to satisfy the Court of the trifling nature and the trifling extent of any corrupt act or illegal practice, he should only be called on to rebut or minimise those of which,

by some form of pleading, he has had notice. Thus, if we suppose a charge that A. an agent, bribed B. a voter, by the payment of money; and if we further suppose the evidence to shew that A. had with him a large sum of money, under circumstances which raise a strong and not unreasonable suspicion that his object was to spend it in purchasing votes, one of those circumstances being the payment to B. of one dollar to induce him to vote for the particular candidate; but the rest of the money not being traced; it might be urged with much force that the measure of the corrupt act, both in its nature and its extent, was the payment of one dollar and the influencing of one vote, which could not be supposed to have been capable of affecting the result when there may have been a substantial majority.

I am sensible of the difficulty of meeting an argument of this kind with an answer which shall, in all respects, square with our ideas of what the principles of pleading may require; but I am not sure that the case is one for a rigid application of those principles. It may perhaps be as correct to say that it is only giving effect to the purpose and intention of the enactment, without violating any principle of pleading, to hold that, in such a case as I have put, the surrounding circumstances show the nature of the specific act; and that while its *extent* may be trifling, its *na'ture* as one overt act of what appears or may reasonably be assumed to be an arranged system of operations, would be misdescribed by the word "trifling."

If all the matters which are proper to be considered under sec. 159 were required to be formally put in issue, a much more complex system of pleading would have to be adopted than that which the statute contemplates.

I think that in estimating the nature and extent of a corrupt act, our vision is not, of necessity, to be limited to the effect of the act which has been specifically charged or specifically proved; but we are to look at its history and the circumstances connected with it; but I am satisfied that the "other illegal practices at the election"

of which the section speaks, are only such acts as are declared illegal by the Election Act.

This term "illegal practices," like so many other things in the statute, is not free from ambiguity. There are many things forbidden, and therefore made illegal, by the statute, as *e.g.* by sec. 138, refusing to obey an order of the Returning Officer, or Deputy Returning Officer, to arrest a person who is disturbing the peace; by sec. 140 refusing to deliver up offensive weapons; by sec. 141 committing a battery; by sec. 142 approaching, armed, within two miles of a polling place; by secs. 143 and 144 furnishing flags to be carried on election day, or ribbons to be worn. These acts, while prohibited in the interest of peace and good order at elections, and in that sense illegal, are no doubt capable of in some way affecting the result; but I do not take them to be of the class which, under sec. 159 are to be considered in connection with the proved corrupt act. I take that class to include those practices only which are dealt with in the group of sections headed "Prevention and punishment of corrupt practices and other illegal acts at elections," and which would come under the jurisdiction of the Court for trial of illegal acts created by sec. 174. But all these acts are also corrupt practices, being either so declared in the sections which forbid them, or by the effect of the interpretation clause; and we could not be required, where the question was not one of scrutiny, to investigate at the trial any corrupt practice, not charged in the petition, against the candidate or his agents. We have in this another reason against receiving evidence upon any allegation of illegal practices except those pleaded; but it may of course, and often does happen that while the proof falls short of sustaining the full charge, it may disclose a corrupt act, or illegal practice, (if both expressions need be used) very proper to be considered in connection with others.

I was at one time inclined to think that the term "illegal *practices*," used in sec. 159 might be intended to denote something more than the words "illegal *acts*,"

which are those used every where else, as in secs. 154 and 174, and as perhaps designed to point to a class of acts or course of conduct to which a particular act might belong. But as the draftsman of the section has adopted the term "corrupt *act*" to express what is elsewhere always called a "corrupt *practice*," I conclude that the words "practice" and "act" are considered interchangeable. It may be a question whether even this liberality gives a meaning to the words "corrupt act" in this section, because that is not the term defined in the interpretation clause.

Without professing to lay down an exhaustive rule, I may sum the matter up by saying that upon the trial of a petition which seeks to avoid an election for corrupt practices alleged to have been committed by a candidate or his agents, I am of the opinion that the petitioner cannot insist on giving evidence of any corrupt practice which he has not charged, and for this purpose illegal acts are corrupt practices. But whether the evidence given upon any charge is sufficient to establish it or falls short of doing so, I think any facts or any course of conduct shewn by that evidence may be properly considered in connection with any other corrupt or illegal practice which has been proved, and the nature or probable extent of which it may serve to elucidate.

We have been urged, with much earnestness, to hold that the transaction with Thomas appears to have been an instance of a systematic scheme of corruption by persons coming from outside the county, supplied with money, either of their own or from some other quarter, for use in bribing voters, or that at all events such a scheme is shewn to have existed, and ought to be considered as against the saving operation of section 159.

The Thomas and McInnes affair does not by itself furnish materials for more than suspicion of an organized scheme. If we take Upper to have been the real actor, and the stranger only his instrument, we are absolutely confined to the one transaction, because it is the only thing in which Upper appears. And the same thing must be said of our

stranger unless he is, by the indirect effect of some of the evidence, connected with other people who have been before us. One person with whom it is suggested he may have been connected is John Nihan; another is Frank Maguire. Both of these men live in St. Catharines, and both of them are shewn by their own evidence, as well as by that of other witnesses, to have been in the county on polling day, having money with them, having come there on account of the election, and being of the same political party with the respondent. Maguire had been a number of times in the county during the week before the election, usually going home to St. Catharines at night and returning in the morning. He appears to have spent his time chiefly at taverns, where he invariably treated all present; being, as expressly shown with reference to one occasion, and as sufficiently indicated as to others, very lavish in this kind of hospitality, though he says he was not more so than is his custom at taverns, he being a liquor dealer and looking to the tavern keepers as his customers. On all these occasions he talked politics, advocating the cause of the respondent. It is not charged that his conduct amounted to bribery under section 149. The charge intended is that he violated section 152 by corruptly giving drink to the people who drank at his expense on these occasions.

It was objected on the part of the respondent that that charge is not covered by the petition, which is by its terms confined to corrupt practices as defined by the Controverted Elections Act; because, while the interpretation clause which gives the meaning of the term "corrupt practices" as used in the Act, includes the word "treating," it is only treating "as defined by this Act or any Act of the Legislature, or recognised by the Common Law of the Parliament of England;" and "treating," it is argued, is not so defined or recognised.

Now, as I pointed out in the *West Simcoe Case, supra*, there is really no definition of corrupt practices contained in the Act, in the sense in which the petition uses the

expression. What the interpretation clause does is not to enumerate or declare what actions shall be corrupt practices, but merely to define the meaning to be attached to the term "corrupt practices" when elsewhere used through the Act.

But taking the petition to charge all those things mentioned in the interpretation clause, the question is, whether there is any offence known by the name of treating; and if there is, whether that is the offence mentioned in section 152 of the Election Act.

We held when this objection was taken, that it must prevail for the reason explained in our judgment in the *West Simcoe Case*, that our Acts contain no definition of treating such as is found in the Imperial Act 17 & 18 Vic. ch. 102, sec. 4, and in the Dominion Act 37 Vic. ch. 9, sec. 94, which, in the definition of the offence, were not followed by the Provincial Act 39 Vic. ch. 10, sec. 1, which is our present section 152.

It has been urged that we ought to find a meaning for this word "treating" in order that no word in the interpretation clause may be silenced. If we should attempt to do this, it does not follow that we should apply it or confine it to section 152. There are other sections which deal with matters that fit the term "treating" in its popular sense quite as well as anything in section 152, and in some cases even better. Section 157 for instance, the subject of which is selling or giving spirituous or fermented liquors or strong drink at a hotel, tavern, shop, or other place within the limits of a polling sub-division at any time during polling day. And sections 151 and 153 deal with some acts to which the popular term may as well be applied as to anything in section 152, while all those three sections embrace matters that in common parlance would not be spoken of as treating.

We are not likely to impair the efficiency of the laws against corrupt practices by holding that no signification can be assigned to this word "treating" as used in the interpretation clause; because everything which can be con-

jectured as intended to be denoted by it is already made a corrupt practice, except only the violation of section 157 on polling day before or after the hours of polling; and if we should by construction hold that to be treating, and therefore a corrupt practice, we should be manifestly doing what the legislature never meant us to do.

Then as the corrupt practice forbidden by section 152 is not charged, and as we could not consistently with our judgment in the *West Simcoe case*, allow it to be charged at this late day, no evidence concerning it was properly receivable, and that which was given, if it ought to be used at all, can only be taken into consideration so far as it may connect itself with some other charge on the record, either as aiding to prove it or as going to show the nature or extent of the offence.

I am not displeased by being saved the necessity at present of deciding what is the precise effect of section 152.

I have entertained and have once or twice intimated the impression, that the acts forbidden by that section are only made illegal when committed by a candidate, or by some one acting under a more direct deputation from him than what has been considered sufficient to constitute an agent for the purposes of the election law. Under the Imperial Act 17 & 18 Vic. ch. 102, sec. 4, and the Dominion Act 37 Vic. ch. 9 sec. 94 by which it is declared that the candidate who corruptly by himself or by or with any person, or by any other ways or means on his behalf, * * gives, &c., shall be deemed guilty of the offence of treating, and shall forfeit, &c., it is clear that the candidate alone is liable to the penalty. This is recognized by several decisions, one of which is the *Bodmin Case*, 1 O'M. & H. 117, where Willes, J. discusses this and other clauses of the English statute; and it is recited in the late Act, 46 & 47 Vic. ch. 51 sec. 1, which extends the prohibition and the penalty to all persons. But while the candidate only, and not his agent, could be visited by the punishment, the election was avoided for a breach of the section committed through an agent for whose acts in that particular the candidate was responsible.

This was laid down by Mr. Justice Willes in the *Bodmin Case*, as the effect of section 36 of the Imperial statute which avoided an election for any corrupt practice committed by a candidate *by himself or his agents*. It seems necessarily to follow from the similarity of the language in the two sections that an act done by a *candidate by his agent*, in violation of this provision, which avoided the election, would also make the candidate personally liable to the penalty attached to the same act done by the *candidate by any person*, or by any other ways and means *on his behalf*; a result one can scarcely suppose to be intended if the agency is only of the constructive kind, which we hold sufficient in other cases.

The distinction between an agent under the election laws and an agent in ordinary business affairs may consist, as has often been pointed out, both in the mode of his appointment or the things from which his appointment may be inferred, and the extent to which his principal is liable for his acts.

In an election contest the candidate is ordinarily affected by the acts of the agent although they are unlawful, and even although they are contrary to the express instructions given to the agent. It may follow from this doctrine that the candidate becomes liable to the pecuniary penalty for treating if his agent, contrary to his orders, commits the offence. I should say it must so follow, if an act done by every one whom the election law calls an agent is an act done *by the candidate by some other person*. This would be a harsh law, and I do not know any case in which it has been necessary to decide whether or not the doctrine of agency must lead to it. But if it is the logical result of the Imperial Statute, sec. 36, I am disposed to think it does not necessarily follow from our laws as found either in sec. 101 of the Dominion Act, 37 Vict. c. 9. or sec. 158 of the Election Act of Ontario, R. S. O. c. 10.

The language of those sections differs from that of the Imperial Statute 17 & 18 Vict. c. 102, sec. 36, in this respect: instead of avoiding the election for acts com-

mitted by the candidate *by himself or his agents*, which is the language of sec. 36, our statutes give that effect to corrupt acts committed by a candidate *or* by his agent, apparently treating the act of the agent as not necessarily the act of the candidate.

Again in sec. 154 which is not copied from any English Act, we have the agent separated from the candidate by the disqualification of any elector who hires a horse etc., for any candidate, *or* for any agent of a candidate.

If one of the anomalies of election agency is that there can be an act of the agent which is not to be regarded as the act of his principal, we have a case in which an agent may commit acts such as a candidate is forbidden by section 152 to commit, and yet not be guilty of any illegal act, inasmuch as the section does not reach him.

Our sec. 152 differs from the Imperial and Dominion Acts by dropping the designation of the offence as the offence of treating. In place of that it declares that "every person so acting shall be deemed guilty of a corrupt practice." I apprehend that we cannot read these words "every person" in this penal clause as including any one except those forbidden to do the act, namely, the candidates. In this respect, therefore, there is no material difference between our statute and the others. They all make the candidate liable to the penalty in case the offence, whether called "treating" or simply declared a corrupt practice, is committed by him, by himself or through his agent. If not committed by the candidate personally or by one who can so bind the candidate as to render him liable on an information for the penalty, then I do not understand it to be committed at all. If every one who is, under the doctrines applied to the election law, called an agent must be held to be an agent whose act is the act of the candidate for the purpose of sec. 152 as well as for all other purposes, which may, after all, be the true conclusion to adopt, a good reason may be shewn for applying a less liberal rule than has been usually acted on to the inquiry whether, in any particular instance, agency has been established. At present,

as I have said, I am not displeased that the necessity for laying down a precise rule does not arise.

But while we are not in a position regularly to discuss Maguire's agency with reference to the charge of violating section 152, by reason of our ruling that that charge does not appear on the record, it is urged that what appeared during his examination at an earlier stage of the trial is a reason for holding that his expenditure of money in treating at the taverns should be taken to be part of the scheme of corruption which is alleged to have existed.

He avows coming to do some electioneering for the respondent, though he says he did not know the respondent, and that gentleman says he did not know Maguire. They were co-religionists, both belonging to the Roman Catholic church. Maguire obtained from several persons the names of voters, and he tells us he called on ten or fifteen persons. Some names he obtained from a young man named Schuman, in Port Robinson; some from John Guinter, who appears to have been an agent; and from Mr. Bennett, who would perhaps also be held to be an agent if his agency became material, he obtained the name of the elder Mr. McInnes, who was, as I understand, the same person to find whom Benjamin Upper made his detour with the mysterious stranger. I do not recollect whether Maguire saw McInnes or not. He tells us he used no persuasion with any one but talk. I imagine the people on whom he called were Roman Catholics, but I am not sure that we were so told, except with reference to McInnes.

There would be a good deal of difficulty in holding that Maguire, who was not a voter or resident of the county, and who had no personal relations with the candidate, and was not working with his knowledge, ought, by reason of anything I have mentioned, to be held to be an agent for all whose acts the candidate ought to be responsible. He may have been constituted an agent by what may be regarded as his deputation by Guinter and Bennett to canvass particular voters or a particular class of voters. But that would be only a limited agency. (*Per Lush, J., in the*

Harwich Case, 3 O'M. & H. at p. 70, and Willes, J., in the *Bodmin Case* 1 O'M. & H. at p. 120.)

Nothing appeared from this evidence from which I could say that his treating at the taverns, which is the only use into which his money is traced, was corruptly done by the candidate by Maguire acting on his behalf.

That question, of course, is not now for decision, and if it were, we do not know that more evidence might not have been given upon it. But if there was tenable ground for connecting Maguire with the stranger, or holding that any part of his money, or money from a common fund with his, was used in the expedition to the McInnes farm, I do not doubt that his conduct throughout might fairly be taken to indicate the nature or to suggest the possible extent of the corrupt act which was then committed. The only semblance of connection is, that Bennett gave Maguire the name of McInnes as a person whom he might see, and that a man whom no one knows went on polling day to see McInnes, but did not see him.

There are too many links missing to enable us to say that such a connection could safely be inferred.

I regard the case of John Nihan as more serious than that of Maguire. That his purpose was to influence the election by corrupt means I do not doubt. He says he came to bet on the election, and I infer that the betting he intended was betting as an engine of bribery. There is nothing in the character of his pursuits, as described by himself, or in such portions of his biography as were elicited from him, or in the circumstance of his turning up on the polling day and enquiring for doubtful voters, and spending his day in the neighborhood of the poll, or in his evasion of service of the subpœna, to repel such an inference. But, if he took any active steps in pursuance of his plans, he managed to conceal them so well that no one has been able to tell us of anything he did in that direction, and his own account is that he gave no money to any one, except for his meals at the hotel, cigars, &c.

The only bet we hear of is from Nihan himself, who says

he bet with a supporter of the candidate to whom he was opposed that that candidate would not have a majority of eighty, which was not the form of a bribe in the interest of the respondent.

Whatever we may surmise, therefore, to have been Nihan's object, we are totally without evidence of his being concerned in doing anything illegal.

The result of all we know of these three men seems then to be, that one of them, who is not identified, but who was not Nihan and was not Maguire, and who is not shewn to have had any money, offered, by words only, to pay money to Thomas to vote or refrain from voting; that Nihan, who had money, and who came with the intention of using it corruptly, is not shewn to have so used it, or any of it; and that Maguire, who did spend money in a somewhat lavish manner in treating, doubtless with the object of ingratiating himself with those whom he met, and making them more accessible to his arguments in favour of the respondent, is not shewn to have violated any prohibition of the Election Act; that there is no connection, beyond their common purpose of aiding the respondent, shewn between the men; and, therefore, there is no conduct shewn on their part which we can deal with as an illegal practice for the purpose of considering it in connection with the corrupt practices that have been established.

I believe the only other matter requiring notice is, an irregularity in the respondent's account of his personal expenses, which are not given in detail as required by sec. 186. We are asked to infer from this default that some part of the sum of \$123 was spent in corrupt practices. No such penalty is imposed by the statute. The law does not compel us to draw any such inference; and, as a matter of fact, I believe it would be wrong to draw it.

The result is, that we determine that the respondent was duly elected. The costs do not follow this event; but, under section 160, they have to be disposed of as if the event had been the setting aside of the election. The respondent must pay the general costs, which of course

will include the full costs which would have been taxable if the only charges had been those on which the petitioner has succeeded, viz., those relating to Thomas, to Mahagan, to the two Wagners, to Morningstar and to Chaffey. With regard to the other charges on which the petitioner failed, the rule we have hitherto followed has been to give the costs touching them to the respondent against the petitioner. We did so in the *West Simcoe Case*, *supra*, and in the *Prescott Case*, *ante* 88, taking as our guide the *North Renfrew Case*, H. E. C. 710, 724, where Wilson, C. J., distributed the costs on that principle, which principle seemed also to have been recognized as correct by Sir Wm. B. Richards, in the *East Toronto Case*, H. E. C. 70, 97.

It is now urged that the proper way to deal with these costs is either to direct each party to pay his own or simply to give the petitioner the general costs of the petition.

In cases arising under the Imperial Controverted Elections Act which are to be found in the three volumes of *O'Malley & Hardcastle's Reports*, and most of which are noted at p. 165 of *Mattinson & Macaskie's Treatise on the Law relating to Corrupt Practices*, the general rule certainly seems to have been to leave each party to pay his own costs of the class of charges in question; though like other general rules, it is not always applied without variation or exception. Each case is, of course, no more than an instance of the way a Judge or two Judges exercised the discretion given them by the law; but such instances are useful as showing what in the opinion of thoughtful and experienced men was a sound exercise of discretion in the circumstances before them. The practice which leaves each party to pay his own costs of the charges on which a petitioner fails, while he succeeds on the whole petition, has some sanction from section 97 of the Controverted Elections Act, where it speaks of regard being had to the *disallowance* of costs caused by unfounded allegations or objections; and upon the whole, a strong case is made out for that course being adopted.

The charges on which, in this case, the petitioner failed

cannot be called frivolous, and there was quite enough evidence given on many of them to convince us that there was nothing vexatious in preferring them. The question is why the good faith of the petitioner should subject the respondent to the cost of defending himself or his seat against an attack founded on mistaken suspicions or imperfect information. If the charges which failed had been the only ones, the respondent would have got his costs as of course. One does not readily see why he should lose them because these charges happened to be associated with some others which he could not successfully resist.

The nature of our local election law which treats as corrupt practices some acts which are not tainted with corruption and which may have no influence, either in fact or in intention, upon the election, affords a reason against the recognition of what may be a general practice in England, as applicable to the same extent here. To take a case which may be an extreme one, but which experience shews is not either impossible or unlikely, that of a tavern keeper, who happened to be an agent under the election law, giving a glass of liquor during the hours of polling to a political opponent who has already voted. Proof of such an act, though by the effect of sec. 159 it will not avoid the election, entails the same costs as if it did avoid it. If it happened that the only charge established by a petitioner were one of this character, while he had made and failed upon numerous charges of actual corruption, there could be no justice in refusing costs of those charges to the respondent.

The general rule spoken of as prevailing in England ought not, in my judgment, to be regarded as sufficient to meet the requirements of our local law. The reason for this which I have just given is from the standpoint of a respondent. But there are also considerations that may affect the application of the rule from the point of view of a petitioner who, after having established a corrupt practice committed by an agent, may find the necessity imposed upon him by section 159 of carrying the inquiry farther.

In ordinary cases, I am inclined to think that justice will be done by disposing of the costs as we dealt with them in the two cases to which I have referred.

In the present case, however, there is no doubt that the zeal of some supporters of the respondent led them to courses of conduct which ran very near the line of illegal acts, and the instances in which this occurred formed a tolerably large proportion of the charges which failed. Some of the more striking cases have been discussed in the judgment now delivered; but there were others, such as that with which Dr. Glasgow was associated, and several more in connection with which we became familiar with the names of McAuliffe, Moyer, Lewis, Deterling, David Crysler, Schloeffel, Washington, Young, &c.

Under all the circumstances, we think it will be a sufficient penalty for the petitioner to be deprived of costs in respect to the charges on which he gave evidence but failed, leaving the respondent to bear his own costs of those charges.

There were a good many charges concerning which no evidence was given. We know nothing of the character of those charges, and we do not know whether or not the respondent was at any expense, which could be recognised as taxable, in preparing to meet them. He will have his costs (if any) incurred in relation to them.

FERGUSON, J.—The charges that the petitioner contends have been proved, and which are yet undisposed of, are: charges Nos. 4, 5, and 6, in particulars No. 1, which are that Benjamin Upper offered money to William M. Thomas and Samuel McInnes respectively, to induce them respectively to vote for the respondent, and that the said Benjamin Upper paid money to Samuel McInnes to induce him to vote for the respondent.

Charges Nos. 52, 53, and 54, in the same particulars, which are: that the respondent promised to procure liquor licenses for Thomas Roach, Hiram Chambers, and Bradley Chambers respectively, to induce them respectively to vote for the respondent.

Charges Nos. 5, 6, and 7, in particulars No. 2, which are : that Luther Boardman offered money to George Haun to induce him to vote for the respondent : that the said Luther Boardman paid money to the said Haun to induce him to vote for the respondent, and that the said Luther Boardman furnished refreshments to the said Haun to induce him to vote for the respondent ; and

Charge No. 1 of particulars No. 3, which is that the respondent promised Luther Boardman to procure, or endeavour to procure the office of license commissioner for the county of Welland for a person unknown to the petitioner to induce the said Boardman to procure, or endeavour to procure the return of the respondent to serve in the Legislative Assembly.

As to charges Nos. 4, 5 and 6, in particulars No. 1, it was shewn that Benjamin Upper on the polling day started alone from Allenburg, a polling place, and having gone about one hundred yards, overtook a stranger, who asked him to give him a ride, which he did ; that they were going towards Port Robinson, and at the toll-gate they turned and went to McInnes' place, a short distance from the direct road ; that the stranger went in and saw the young man Samuel McInnes, and asked him if he had a vote, and being answered in the affirmative, asked him if he intended to vote, and being again answered in the affirmative, came away ; Benjamin Upper during the time remaining upon the road ; that they then proceeded towards Port Robinson, and met Thomas on the way, when the stranger asked Upper who Thomas was, and Upper told him ; that the stranger then called to Thomas to stop, and that, when he did so, the stranger went to him and offered him \$5, and afterwards double that amount, to refrain from voting (to stay at home). Thomas swears that Upper did not offer him anything. It is not shewn that Upper heard the stranger make the offer. Upper swears that he did not pay or offer either Thomas or McInnes anything : that he did not hear the offer made to Thomas ; that he did not know that it was made, and that he did not make any inquiry

as to what had passed between the stranger and Thomas. McInnes swears that the stranger did not offer or give him anything. It was contended by counsel for the petitioner, that the inference should be drawn that Upper knew what the stranger was doing; that he was a party to the stranger's acts, and that the act of offering the money to Thomas was as much the act of Upper as of the stranger, and that the charge of the offer of money by Upper to Thomas was proved. (The charge is the offer of money to vote, but a very slight amendment would make the record right if the evidence were sufficient.) This inference I do not draw, and I do not think that in the face of the testimony to the contrary, it should be drawn; and, I think the finding in respect of these charges should be, that no offer or payment of money is shown to have been made by Benjamin Upper.

As to charges Nos. 52, 53 and 54, in the same particulars, I think the petitioner must fail. Both the Chambers and Roach positively deny that any such promise was made. Henderson does not really prove anything in respect of such a promise, and a finding in favour of the existence of the promise charged, would be, in my opinion, a finding against the evidence. I think these charges should be disposed off in favor of the respondent.

I am also of the opinion that the charges Nos. 5, 6 and 7 in particulars, No. 2 must fail upon the evidence, and be disposed of in favor of the respondent.

I am also of the opinion that the evidence does not support charge No. 1 in particulars No. 3, and that this should be disposed of in favour of the respondent.

The case upon the petition has now to be considered. Charge No. 49, the payment of the travelling expenses of a voter, John Mahagan, by Twohey and Flynn, agents of the respondents, has been proved and found in favor of the petitioner. This is the only corrupt practice proved against the respondent or any of his agents. This was found to have been committed by the agents without the knowledge or consent of the candidate, the respondent.

The act was the payment of the travelling expenses of a voter who was temporarily absent from the country, and who, it is fair to assume, would not otherwise have voted on either side. This act seems to me to stand alone. It does not appear to have been a part or parcel of any system or method of corrupt practices; or, as having any connexion with other acts of the same character. Its effects seems to me to be confined to this single voter, and I am of opinion that taken alone, this act was of such trifling extent, that the result of the election cannot have been, or cannot be reasonably supposed to have been affected by it.

This corrupt act cannot, in this case, however, be taken alone, for the provisions of the 159th section of the Act do not, unless the act was of such trifling nature, or of such trifling extent that the result cannot have been affected, or cannot be reasonably supposed to have been affected by it, either alone or in connection with other illegal practices at the election, save the election from being avoided by reason of the corrupt act of the agent, though without the knowledge or consent of the candidate, and a question arises here as to what illegal practices are to be taken in connection with the one corrupt act of the agent.

I am quite sensible of the difficulty in saying what is the proper meaning of the words "other illegal practices at the election," which occur near the end of the section, and that, differences of opinion may well exist as to what is their true meaning and application, but I think one is safe in saying that they must be illegal practices, the existence of which is ascertained and known, and that the way in which their existence becomes known is by the evidence. This cannot I think rest in conjecture. It must be proved.

During the trial in this case while evidence was being given in respect of alleged treating by a man named McGuire, an objection was taken to the receiving of the evidence, and, following a ruling in the *West Simcoe Case*, ante 128, it was decided that the evidence could not be received unless taken conditionally, and the petitioner's

counsel declined so to give it, but, offered it as good evidence. The petitioner's evidence on the subject had not been completed, and the respondent gave no evidence on the subject at all. It was, however, contended that because in this evidence, so partially taken, certain facts were sworn to by witnesses, these must be taken as illegal practices (if they were such) in connection with the corrupt act of the agent. I am not of that opinion, and, I think the case stands just as if no evidence had been given on that subject.

It was also contended that the fact that a man named John Nihan was in the constituency with some money in his possession must also be taken in connection with the corrupt act of the agent, but it was not shewn that Nihan did any illegal act with the money. On the evidence of Mr. Coppin, this appeared a proper subject for further investigation. The petitioner called Nihan as a witness. His evidence shewed the charge on which it was given to be without foundation, and that he had not been guilty of any illegal act, and this testimony remains uncontradicted. I think, however, that whenever in giving evidence to prove a corrupt practice charged as having been committed by an agent, it appears that illegal practices took place, though the evidence failed to prove the agency, these illegal practices are comprehended in the meaning of the words "other illegal practices at the election," which occur near the end of the section, and must be taken in connection with the corrupt act of the agent. If this were not so, I do not see how any "other illegal practices" could, under the present mode of pleading, be made to appear to be taken in connection with the corrupt act proved to have been committed by the agent.

Looking at this case, then, in this way, the corrupt act proved to have been committed by the agent without the knowledge or consent of the respondent, must be taken in connection with the illegal practices (1) The giving of spirituous liquor by Boardman to Chaffey at his tavern within the polling sub-division during the hours appointed

for polling. (2) Three acts of Caleb Doane, the payment of a small sum of money to John Wagner and Jacob Wagner each, and the offer of money to Michael Morningstar to vote for the respondent, and (3) The fact that a stranger offered money to Thomas to refrain from voting at the election.

Each of these illegal practices seems to me, upon the evidence, to be of very trifling extent. That committed by Boardman was the giving of a single glass of liquor to one who was opposed to him in politics, who had already voted, and who was a neighbour, and asked it because, as he said, he was ill. The acts committed by Caleb Doane were of a petty character, and it is noticeable that he seems to have acted dishonestly, even in regard to these small sums, with those to whom he gave the money.

The act of the stranger, or the stranger himself, I know nothing of, beyond what has been stated. On the whole case, I am of the opinion that the corrupt act proved to have been committed by agents of the respondent without the knowledge or consent of the respondent was so trifling in extent that the result cannot have been affected by it, either alone or in connection with the other illegal practices at the election that have been shewn to have taken place, and I think the election should not be avoided.

I do not see that anything turns upon what was urged respecting non-compliance with the provisions of section 186.

I agree in the disposition of the costs made by Mr. Justice Patterson, under the provisions of section 160 of the Act.

G. A. B.

LENNOX.

PROVINCIAL ELECTION.

Re HAMILTON, *Petitioner*, v. THOMPSON ET AL., *Respondents*.

BEFORE THE COURT OF APPEAL.

Present.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

TORONTO, 29th May, 1885.

23rd June, 1885.

Controverted Elections Act, R. S. O. ch. 11—Corrupt practices Election Act, R. S. O. ch. 10, secs. 174, 175—Appeal from special Court for summary trial of corrupt practices.

The right of appeal given under section 63 and following sections of the Controverted Elections Act, R. S. O. ch. 11, does not extend to decisions either of the Judge or Judges for the trial of the petitions or other Judges sitting as a Court for the trial of corrupt practices under sections 174 and 175 of the Election Act R. S. O., (1877,) ch. 10 and amendment.

Observations upon anomalies and difficulties in the procedure.

AN election petition was presented, pursuant to the Controverted Elections Act of Ontario, by A. G. Hamilton, as petitioner, against George D. Hawley, as respondent, in respect of an election held for the electoral district of Lennox.

In the course of the trial of the petition before the two rota judges assigned for that purpose, it appeared from the evidence that Robert Thompson, Ezekiel Miles, and James O'Brien, had been guilty of corrupt practices in connection with the election, and at the instance of the petitioner a summons was granted by the judges, pursuant to section 175 of the Election Act, or 47 Vict. ch. 4, sec. 31, "The Election Law Amendment Act, 1884," calling upon these persons to appear before the Court constituted for the trial of corrupt practices and other illegal

acts committed during the election, to answer the charges, and to shew cause why they should not be adjudged to be guilty of the corrupt acts or practices specified, which consisted of nineteen distinct acts of bribery, alleged to have been jointly committed by them. And further, to shew cause why they should not be ordered to pay the penalty imposed by the Election Act for the committing of each of such corrupt acts, &c., and why, in default of payment, they should not be imprisoned, and why they should not also pay the costs, &c.

After several adjournments the summons was finally heard and disposed of on the 6th of March, by and before the judges by whom it was granted.

The prosecutor abandoned four of the charges, and, as stated in the appeal book, the judges then determined and adjudged that Thompson, Miles, and O'Brien were guilty of the remaining fifteen charges, "but the counsel for the said prosecutor electing that the said Thompson should be found guilty of the first five of the said charges, and the said Miles of the second five thereof, and the said O'Brien of the third five thereof, the said judges adjudged and determined accordingly, and the said Thompson, Miles and O'Brien were each ordered to pay to the petitioner, who was also the prosecutor, the sum of \$200 and the costs of the said prosecution, that is to say, the sum of \$600 in all and costs."

The prosecutor thereupon elected, as sub-sec. 11 of sec. 175, permits him to do, to recover the amount imposed upon Thompson and Miles by process sued out of the High Court. He made no election in the case of O'Brien, who was sentenced to undergo, in default of payment within one month of the \$200 and costs, nine months imprisonment in the common gaol.

Against this order or decision the prosecutor appealed under section 63, and following sections of "The Controverted Elections Act," on the ground that the learned judges, instead of imposing upon each of the persons accused, a single penalty of \$200, should have imposed upon

each of them a penalty of \$200 for each of the corrupt practices found to have been committed by them, that is to say, five separate penalties of \$200 upon each of the accused.

On the appeal coming on for argument 29th May, 1885.

Britton, Q.C., on behalf of the respondents, moved to quash the proceedings on the ground that the right to appeal under section 63, and following sections of the "Controverted Elections Act," was given only to one who was a party to an election petition, and in that character, and was confined to the decision or determination of the judge or judges on the trial of such petition, and did not extend to the decision of such judges or other judges sitting as a court for the trial of corrupt practices, under sections 174 and 175 of the Election Act.

McCarthy, Q.C., *Poussette*, Q.C., and *Creelman*, contra.

June 23rd, 1885. OSLER, J.A.—The objection taken by Mr. *Britton* appears to me to be well founded.

By the sections of the Act referred to a special court of summary jurisdiction is constituted before which any person, who is not a party to the petition, may be tried in a summary manner for any corrupt practice or illegal act committed by him in connection with the election, instead of by action or indictment in the ordinary courts of law.

That court is not the court for the trial of an election petition, constituted under sections 32 and 43 of the Controverted Elections Act. It may be presided over by the judge or judges who try the petition. But it may also be presided over by any judge upon the rota for the trial of petitions, or by a judge of the High Court holding a sittings of that court for the trial of civil or criminal causes.

Sub-section 1 provides that the proceedings may be taken, before, at, or after the trial of a petition.

Sub-section 4. The judge or judges who attend to hear the matters charged, or before whom the summons is

returnable shall "investigate and dispose of" (in plain English, hear and determine) the case in a summary manner, and shall have the same power and authority to do so as two judges sitting at the trial of an election petition have for the investigation of a charge of a corrupt practice alleged in the petition to have been committed by the candidate against whom the petition was filed.

Sub-section 6. The person charged shall be allowed to make full answer and defence, &c.

Sub-section 7. If the judge or judges are satisfied that the person charged has committed the corrupt practices charged in the summons he or they "shall adjudge that said person has committed them," and shall order him to pay to the person at whose instance the summons was issued, called the prosecutor, the money penalty by law assigned to the offence.

It thus appears that the proceeding in question, as regards its institution, the parties to it, the time and mode of trial, and the constitution of the court before which it may be heard, is one entirely distinct and separate from the election petition.

The petitioner or the respondent may be the prosecutor, but so may any one else, and there is no reason to say that, as regards that proceeding, he is or becomes a party to the petition any more than the person charged becomes or can be such. It is a matter entirely collateral.

Then where do we find any provision for an appeal? There is nothing in the Election Act which gives it, and it is clear law that an appeal does not lie unless expressly given. It is urged that it lies, and the present proceeding has been taken, under section 63 and following sections of the Controverted Elections Act. But the appeal referred to in those sections obviously relates to the decision of the judges upon the trial of the petition. It can only be brought by "any party to an election petition." It is the matter of the petition which is to be set down for hearing before the Court of Appeal. It is the parties affected by the appeal

or the agents who represented them on the trial of the petition to whom notice of setting down the appeal is to be given, and the judgment or decision of the Court of Appeal is to be certified to the Speaker of the House, &c.

There are insuperable difficulties in the way of holding that the case of a summary conviction for corrupt practices comes within these sections.

I therefore think that the appeal should be quashed. Whether an appeal can be taken under any other Act it is not now necessary to determine. When the prosecutor elects to recover "the amount imposed," by process sued out of the High Court, the order may be filed in one of the divisions, and execution may be issued, and any other proceedings may be had and taken thereon as upon an ordinary judgment of the court. Whether this would include an appeal in the ordinary way is more than doubtful, and certainly there would be no appeal where imprisonment is ordered in default of payment, as in that case the order is not filed in the High Court. It may be that the proceeding being of a summary character can be brought up and reviewed on *certiorari* according to the dictum of Abbott, C. J., in *Rex v. Hanson*, 4 B. & Ald. 519, 521. "The rule of law is, that a *certiorari* lies unless expressly taken away, yet an appeal does not lie unless expressly given by statute."

This case affords another illustration of the necessity for a well considered revision and consolidation of the election law.

It is not reasonable that proceedings which so seriously affect a man's liberty or estate should not be subject to appeal as in ordinary cases, nor on the other hand is it right that persons guilty of such gross and abundant bribery as the respondents. should escape as it is said they have escaped here, the full and effectual punishment due to the offence.

There is a strange anomaly in excluding the parties to the petition from liability to the proceeding by which the penalty imposed for corrupt practices or illegal acts may

be enforced by imprisonment; and it is also remarkable that while it is anxiously provided that allegations in a petition of corrupt practices against a candidate or his agents shall be tried by *two* judges, who must now concur in finding guilty and disqualifying, (Controverted Elections Act, R. S. O. ch. 10, s. 38, as amended), any one *not* a party to the petition may be proceeded against for similar charges before *one* judge only, who by sub-section 7 of section 175 as amended by 47 Vict. ch. 4, sec. 31, may adjudge that such person has committed corrupt practices, &c.

Section 38, too, of the Controverted Elections Act, as amended by section 33 of the Act last referred to, expressly enacts that *no person* shall be found guilty of a corrupt practice, or disqualified, except upon the decision of two judges jointly, or of the Court of Appeal; an enactment not inconsistent with summary proceedings under sec. 175 as it formerly stood, which must have been taken before the two judges mentioned in section 174, but which is not so easy to reconcile with the new section.

The question will also no doubt arise whether a summary conviction for corrupt practices by one judge is such a proceeding—having regard to section 38 of the Controverted Elections Act—as under section 164 of the Election Act, disfranchises any person other than a candidate found guilty of corrupt practices.

HAGARTY, C. J. O., BURTON and PATTERSON, JJ.A. concurred.

Appeal quashed.

LINCOLN AND NIAGARA.

DOMINION ELECTION.

BEFORE OSLER, J.A., IN CHAMBERS.

TORONTO, June 28 and July 4, 1887.

WILLIAM KING PATTISON, *Petitioner*, v. JOHN CHARLES
RYKERT, *Respondent*.*Election petition—Unauthorized alteration—Ratification—Amendment*

After an election petition had been filed, two clerks of the Toronto agents of the solicitor for the petitioner were allowed to compare it with an engrossed copy, and finding that the two were different, they altered the filed petition so as to correspond with the copy, adding in one place the word "treating," which had the effect of introducing a charge of a corrupt practice not in the original. The copy served upon the respondent after this alteration corresponded with the petition as altered. It was not shewn and it was denied that the petitioner knew of the alteration.

Held, that the addition of the word "treating" was an alteration in a material part; but that the clerks in doing what they did were not the agents of the respondent or his solicitor. As the document was in the possession of the Court, such an alteration, made by persons who were mere strangers or spoliators, had not the effect of destroying it. The service of the petition in its altered condition could not, in the absence of knowledge of the alteration, be treated as a ratification by the respondent.

It was ordered that the petition should be restored to its original state, and that the copy served should be amended to conform with the petition as it was when filed. *

THIS was a motion on behalf of the petitioner made before Osler, J. A., in Chambers, to strike out the preliminary objections to this petition. The motion was turned into a hearing of the preliminary objections.

The material facts which led to the filing of the preliminary objections were not in dispute between the parties, and were as follows :

* See note at end of case.

The petitioner, who was the defeated candidate at the election, was himself a barrister and solicitor, but did not present the petition in person.

Under his instructions the petition in question, after having been signed by him, as required by the statute, was on Saturday the ninth day of April, 1887, presented for him by being delivered to the Registrar of the Court of Appeal, in Toronto, by Messrs. Blake, Lash, Cassels, and Holman, the solicitors for the petitioner, appointed by him to be his agents in the matter of this petition.

On the following Monday, the eleventh day of April, 1887, two students-at-law, clerks in the office of the solicitors for the petitioner, were sent by the solicitors to examine the petition filed and compare a copy of it with the original.

While engaged in this examination and comparison these gentlemen noticed the omission from the petition of any charge of treating against the sitting member, and thereupon inserted the word "treating," thus making the petition filed correspond with the copy in their possession.

The original petition, as presented, was not afterwards signed by the petitioner, but on the next day, Tuesday, the twelfth day of April, 1887, there was served upon the appellant a copy of the petition, containing the added charge of treating, signed by the hand of the petitioner himself, and accompanied by a notice over the name of the petitioner, "by Blake, Lash, Cassels, and Holman, his solicitors," appointing that firm of solicitors to be agents for the petitioner in the matter of the petition.

The respondent submitted by his preliminary objections that by reason of the facts above stated the petition had lost all force and virtue, and become wholly null and void, and should be taken off the files.

McCarthy, Q. C., and Aylesworth, for the respondent. There was a material and wholly unauthorized alteration in a written instrument, requiring to be authenticated by the signature of parties, which avoids the instrument:

Pigot's Case, 11 Rep. 26 b; *Master v. Miller*, 4 T. R. 320 : 1 Sm. L. C. 857 (8th ed.) ; 2 H. Bla. 140 ; *Davidson v. Cooper*, 11 M. & W. 778 ; 13 M. & W. 343 ; *Suffell v. Bank of England*, 9 Q. B. D. 555 ; *Lowe v. Fox*, 12 App. Cas. 206 ; *Bank of Hindostan v. Smith*, 36 L. J. C. P. 241. It was essential to the validity of the petition that it should be signed by the petitioner : The Controverted Elections Act, 37 Vic. ch. 10, sec. 8 ; R. S. C. ch. 9, sec. 9. The same effect must be given to the act of the clerk as if it had been the act of the solicitors. The solicitors have general authority to bind their client by their acts : *Pulling's Law of Attorneys*, 3rd ed., p. 102, *et seq.* The petitioner is responsible for the consequences of an unlawful alteration by his authorized agent : *Pattinson v. Luckley*, L. R. 10 Ex. 330. The service upon the respondent of a copy of the petition in its altered state signified the intention of the petitioner to take advantage of the alteration.

Lash, Q. C., for the petitioner, contra. The alteration is not a proper subject of preliminary objection. It was not made by any person having authority to make it on behalf of the petitioner. The petition was not in the possession of the petitioner, or of any one for him, but was on the files of the Court : *Suffell v. Bank of England*, 9 Q. B. D. 555 ; *Lowe v. Fox*, 12 App. Cas. 206 ; *Henfree v. Bromly*, 6 East 309. There was no ratification of the alteration by the petitioner : *Falcke v. Scottish Imperial Ins. Co.*, 34 Ch. D. 234, 249. The alteration was not a material one ; the general charge in the petition of corrupt practices includes treating, so that the insertion of the word was mere surplusage : see *North Ontario Election Case*, *ante* p. 1. There is power to amend the petition : R. S. C. ch. 9, sec. 2, sub-sec. 8 ; Rule 474, O. J. A. ; *Rogers on Elections*, ed. of 1866, part II., p. 717 ; *Aldridge v. Hurst*, 1 C. P. D. 410.

OSLER, J. A.—The circumstances under which the alterations complained of were made in the petition have been fully explained, and it appears that they were not made by the petitioner, nor by his agent or solicitor, nor in any

way by his authority. The petition had been regularly filed, and two clerks of the agents of the petitioner's solicitor, a day or two afterwards, went to the office of the Registrar of the Court for the purpose of comparing an engrossed copy of the petition with the petition. What occurred there is thus stated by the clerks in their affidavits.

"In comparing the said copy it appeared that in the third paragraph the word "treating" was in the engrossed copy, but not in the petition filed. The matter was mentioned, when Mr. Grant (the registrar) said, "make them correspond," or words to that effect. I assumed that the petition should be made like the copy, and the petition was accordingly in this respect made like the engrossed copy."

This was a very extraordinary misunderstanding of what the registrar said, who could of course have meant nothing else than that the necessary alteration should be made in the engrossment, but I have no reason to doubt the explanation, especially as several other minor and formal alterations were made at the same time in order to make the hastily and carelessly prepared petition correspond with the engrossment, and it is quite probable that the clerks may not have been alive to the impropriety—plainly a contempt of Court—of making an unauthorized alteration in any document on the files. However this may be, it is impossible to hold that they were in any sense the agents of the petitioner, or of his solicitors, in doing what they did, and assuming, as I think I should assume, that the alteration was in a material part of the document, introducing as it does a precise charge of another corrupt practice, yet as the document was not in the possession of the petitioner, but was in the possession, so to speak, of the Court, even such an alteration made, as I hold, by persons who were mere strangers or spoliators, would not have the effect of destroying it. For this I refer, if authority be needed, to *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Suffell v. The Bank of England*, 9 Q. B. D. 555; judgment of Brett, L. J., 566; and to *Henfree v. Bromly*,

6 East 309. In *Lowe v. Fox*, 12 App. Cas. 206, the document altered was in the possession of the party relying upon it when the alteration there complained of was made, but was not of a material character, and therefore did not destroy it.

The service of the petition in its altered condition cannot be treated as a ratification of the act of the clerks, as was argued, because it is not shewn (and is in fact denied) that the petitioner knew of the alteration: See *Falcke v. Scottish Imperial Ins. Co.*, 34 Ch. D. 234: judgment of Bowen, L. J., 249, 250.

Mr. Lash asked that the petition should be restored to its original state. I think that should be done, and as the copy of the petition served has been brought into Court, and is now before me on this application, I also think that in order to avoid the necessity of a special application to amend, I should direct the copy so served to be amended in order to conform to the petition as it was filed, in accordance with the well understood practice at law before the Judicature Act. But as the application to take the petition off the files was under the circumstances justifiable, and it was necessary to explain how the alteration came to be made, Mr. Lash's application and the amendment can only be granted on the terms of payment of the costs of the preliminary objections, and of the motion.

Order accordingly.

NOTE.—An appeal from the foregoing judgment was allowed by the Supreme Court of Canada by consent of parties. The following is a note of the proceedings in that Court on the hearing:

October 25, 1887. *McCarthy*, Q. C., for the appellant. (No counsel appears for the respondent.) This is an appeal from a judgment of Mr. Justice Osler overruling preliminary objections to an election petition. I have a consent from the petitioner's agents and solicitors that the appeal should be allowed, and the petition be dismissed, but without costs, and the result will be that the preliminary objections are to stand. (Consent read.)

TASCHEREAU, J.—In this Court we have done so before, but in the Province of Quebec we have always refused to allow appeals upon consent.

McCarthy.—In the North York case the appeal was allowed in the Court by consent, and the judgment of the Court below upon preliminary objections was reversed.

STRONG, J.—All we can do is to allow the appeal, but without costs ; and *that only disposes of the preliminary objections*.

RITCHIE, C. J.—The order must be made that upon reading the written consent of the attorney and agent of the petitioner, the preliminary objections are sustained, and the appeal is allowed, but without costs.

EAST NORTHUMBERLAND.

PROVINCIAL ELECTION.

BEFORE BOYD, C., AND OSLER, J.A.

BRIGHTON, October 11, 12, 13, and 28, 1887.

TORONTO, October 29 ; November 19 and 26 ; December 3 and 12, 1887.

ICHABOD RICHMOND, *Petitioner*, v. WILLIAM A.WILLOUGHBY, *Respondent*.

Agency—Bribery—Illegal practices—Scheme for violating secrecy of ballot—Election Act, R. S. O. (1877) ch. 10, secs. 146, 159.

The respondent was nominated by a convention of the Conservative party, composed of fifty or seventy-five persons, among whom was R., who was well known as a prominent member of the party, and was on intimate terms with the respondent, both of them being physicians. R. was one of the persons nominated at the convention, but the choice fell on the respondent, who then made a speech of acceptance in which he said he expected his friends to take an interest in the election and to work for him. R. made no systematic canvass, but he asked several people for their votes, was at various informal meetings of voters held in the interest of the respondent, and with the respondent visited the houses of several voters.

Held, that R. was an agent of the respondent.

F. D. was also at the convention which nominated the respondent, and he and W. D. were among the supporters of the respondent in a particular locality who held meetings at which the voters' lists were discussed and arrangements were made for looking up doubtful voters.

Held, that these men were both to be regarded as agents of the respondent.

R. committed two clearly proved acts of bribery ; F. D. and W. D. entered into a scheme for violating the secrecy of the election by inducing voters to exhibit their ballots, after they were marked, at a window ; and the evidence developed at least two other acts of bribery, though not by agents, and some suspicious circumstances ; but all these were without the knowledge or consent of the respondent. The vote polled was about 4,500, out of which there was a majority of 51 for the respondent.

Held, that the election was void because of the corrupt acts of R. ; and in view of the conduct and details of the contest, the saving provisions of sec. 159 of the Election Act, R. S. O. (1877) ch. 10, could not be applied.

Per curiam.—The scheme for violating the secrecy of the ballot was an illegal act under sec. 146, and had no little significance when taken in connection with the proved acts of bribery. In estimating the application of sec. 159 it was impossible to leave out of sight the illegal practices under sec. 146.

The West Simcoe Case, ante 153, referred to and followed.

THIS was a petition under the Ontario Controverted Elections Act, tried partly at Brighton and partly at Toronto.

The petition contained the usual charges of corrupt practices by the respondent and his agents.

Lash, Q.C., and W. R. Riddell, for the petitioner.

McCarthy, Q.C., and Ketchum, for the respondent.

The evidence for the petitioner not set out in the judgments was, so far as material, as follows :

David Ewing, called by the petitioner, said that he had been secretary of the Liberal Conservative Association for the East Riding of Northumberland for the past twelve years. A nomination for the election in question was made in the month of November, 1887. The delegates to the convention were called together by the witness. *Dr. Willoughby* (the respondent) was summoned to the convention ; he was not then thought of as a candidate ; he was present at the convention ; witness heard him make a speech, after he had been nominated ; believed he asked those who were there to work for him. *Dr. Richards* was at the convention, and was one of those nominated. In calling the convention the witness picked out the active men. There was no membership fee required of delegates to the convention.

Cross-examined, the witness said he had no authority by the constitution of the Conservative Association to call delegates in the way he did ; it grew to be the practice. The convention had nothing to do but nominate candidates ; it was called for that purpose ; it was no part of the duty of the association to render assistance to the candidates. Witness could not repeat what *Dr. Willoughby* said in his speech at the convention ; he would describe it as the stereotyped speech that all candidates make.

Dr. Nicholas Richards, called by the petitioner, said that he was at the meeting which nominated *Dr. Willoughby* ; canvassed for him ; saw him during the election ; was at

several small meetings during the election; drove Dr. Willoughby one morning during the election, but could not recall speaking to him about the contest. Phillip Kennedy and witness went together to see electors in the interest of Dr. Willoughby.

Cross-examined, witness said he had not been elected or appointed a delegate to the convention. The small meetings he spoke of were not organized or committee meetings; they were all informal, accidental, he might say. There might have been nine or ten persons at these meetings. Witness drove Dr. Willoughby to see a voter, but did not go in with him.

John Noonan, called by the petitioner, swore he got \$5 from Dr. Richards, the day before the election. Witness didn't ask the doctor what he gave him the money for; he didn't mention the election. Witness gave the doctor back the \$5 a few days before the trial; the doctor came to witness then with a man named Walker; witness had then heard that this charge was made. Walker gave witness the \$5 to hand back to the doctor. Witness knew of no reason why the money was given him except to vote for Dr. Willoughby. Witness knew Dr. Richards was a Conservative; he slipped the money into his hand as he was shaking hands to say good-bye.

Michael Shaughnessy, called for the petitioner, said that Dr. Richards came to his place with Philip Kennedy within a week before the election. John Noonan was there with witness. Kennedy spoke of the election, and asked him to vote for Dr. Willoughby. Witness said he hardly knew whether he would; if he voted at all, he would vote for Willoughby. After that Dr. Richards shook hands with witness in saying good-bye, and left \$5 in his hand.

Richard Philp was called on behalf of the petitioner, and admitted giving \$3 to John Calberry, and \$1 to Phineas Rickson. The latter was after the poll had closed. He said these payments had nothing to do with the election. He was a supporter of Dr. Willoughby, and had canvassed for him, but was not at the convention which nominated him.

John Calberry swore to getting \$3 from Richard Philp on election day, about four o'clock. After getting it, he went and voted.

Phineas Rickson said he got \$2 from Richard Philp, the night of the election, after it was over. Philp didn't say what it was for. Witness had told him he had voted. Before witness voted he told Philp he was going to vote for Dr. Willoughby, though his politics were Reform.

Cross-examined, he said there was no bargain that he was to get money for his vote. He took the money and spent it with Philp. Philp did not promise him money when he voted.

Such other portions of the evidence as are material are sufficiently set out in the judgments, which follow.

December 12, 1887. *Boyd, C.*—The convention called to nominate the Conservative candidate was composed of active party men who were summoned to attend by the secretary of the Liberal Conservative Association, according to a method pursued for the last ten years. Thereupon some fifty or seventy-five persons met in November, among whom was Dr. Richards. He was well known as a prominent member of the party in the locality where he lived; and he was on intimate terms with the respondent. Dr. Richards was one of the persons nominated at that meeting, but the choice of the convention fell on Dr. Willoughby. The latter then made a speech of acceptance, and it is to be fairly inferred from all the evidence that he then said he expected all his friends to take an interest in the election and to work for him. Dr. Richards did certainly act in this way. He was at various meetings of voters (of an informal character, as he states) at which the matter discussed was what was best to be done in the interests of their candidate. Dr. Richards admits that, though he made no systematic canvass, he did nevertheless take occasion to ask people for their votes, and spoke to those he met with as he journeyed about in the course of his practice. While the doctor lays stress on

the fact that there was no systematic organization at work for the respondent, his evidence discloses that there was an informal but effective agency in operation, of which he was a conspicuous unit, whereby canvassing was prosecuted in a wide-spread way. No better agency for seeing voters at all times and in various directions can be devised than the utilization of a country physician's opportunities as he drives to and fro in the visitation of his patients. This consideration probably explains why the medical element has cropped up so strongly in many of the recent election trials.

It was thus, at all events, that Dr. Richards aided his professional brother. It is admitted also that the two drove together and visited the houses of several voters whom Dr. Willoughby wished to propitiate, and who were apparently known to Dr. Richards personally, and not to Dr. Willoughby. We have in these facts a combination of circumstances which seems to me sufficient to constitute agency as between the candidate and this prominent promoter of his cause. I need not repeat what has already been well said as to the close relationship which exists between the members of a nominating convention and the candidate who puts himself in their hands, but will simply refer to the language of Cameron, C.J., in the *Lennox Case*, ante at p. 61, and the language of Patterson, J.A., in the *Muskoka Case*, ante 197, which is concurred in by my brother Ferguson, who was his colleague in that trial.

Starting with this close connection between Dr. Richards and Dr. Willoughby, there is additional evidence which goes to implicate the candidate in the conduct of this active supporter. There are proved various indications of agency, as it is viewed in election contests, which gain weight and cogency from their cumulative character. Agency being thus established, the proof of bribery on the part of Dr. Richards is very clear as to the two voters, Michael Shaughnessy and John Noonan, who each received \$5 from him as an inducement to vote.

As to the Philp charges, I have with hesitation resolved to give him the benefit of doubt as to the payment to Rickson, that it was not done corruptly; but I cannot extend my charity sufficiently to cover the case of John Calberry. The \$3 given to him was before he voted, and when he said he was going to vote, and it could have been intended for no other purpose than to influence his action. This corrupt act, however, does not affect the respondent, because the evidence is, in my opinion, insufficient to connect Philp with Dr. Willoughby as his agent.

There was also, in my opinion, a corrupt act proved between Joseph Robinson and Spence Ventris, a hotel-keeper in Colborne, by which the latter paid the former \$2 on the morning of the election. Ventris, though not an agent of the respondent, was acting in the Conservative interest, and has failed to explain away the obvious meaning of the transaction.

There is another very suspicious transaction between Willet Palmateer and John Goodfellow. I think the reasonable conclusion from the evidence is, that in the interests of the party represented by the respondent, Goodfellow paid Palmateer to keep away from voting. He engaged him to work from two to four o'clock, for which thirty cents would be sufficient compensation, and he paid him \$1 therefor, although Palmateer expected more.

There is also another evidence of the fact that a good deal of money was afloat in the contest. Franklin, a voter, was telegraphed for to go from Toronto to Colborne to vote. The message was despatched in Dr. Willoughby's name, was charged in his account of expenses, and was duly paid by his financial agent. Both of these deny having sent it, or having been in any way privy to its transmission. Pending the trial this and other telegrams were destroyed by the directions of the manager of the telegraph company.* As to the contents of the Franklin message, there was no satisfactory evidence. The operator thought it ran somewhat thus: "Come down to-morrow;"

* See *Re Dwight and Macklam*, 15 O. R. 148.

and it might have said: "It will be all right." Franklin, with others also telegraphed for, went from Toronto, and he forgot to take money with him. At Colborne he spoke about not losing his expenses; and one who came from Toronto, Labelle, then gave him \$5. There is no trustworthy explanation of this transaction, or of the source from which the money was derived. Probably a clue would have been obtained, but for the disappearance of the written evidence.

The double act of bribery committed by Dr. Richards does not suggest an isolated transaction, but rather indicates that it was part of an organized scheme. He does not on this occasion pursue his usual practice of canvassing as he goes his professional rounds; but there is a special expedition on the day before the election, in which he is accompanied by a friend, Philip Kennedy, a store-keeper at Hastings. In the cases of Noonan and Shaughnessy, who were slightly known to Dr. Richards, the *modus operandi* was suggestive of a preconcerted method of action. Kennedy, with whom they are on more familiar terms, first interviews them apart from the doctor—feels their pulse so to speak—then he returns and reports symptoms, and thereupon the doctor comes forward and administers the dose. Now it is very significant that Dr. Richards (beyond admitting that he and Kennedy went to see voters in Dr. Willoughby's interest) is not examined on this head of inquiry at all by the respondent, nor is Kennedy even called by him. We have no pledging of their oaths to counteract the presumption that these men were on a tour of corruption, and that they saw many more voters and spent much more money than is in actual evidence.

The house of Robert McDonald (blacksmith) was next to one of the polling places. It was at this house that many of Willoughby's supporters used to hold meetings; among the rest Willis Duncan (who was a member of the municipal council) and Frank Davidson. Davidson is a newspaper agent, (is also called a farmer) and appears to be a person of much intelligence and shrewdness. From the

house where they met the polling booth could be seen. The voters' lists were discussed, and it was arranged about looking up those who were doubtful voters. Frank Davidson was at the convention that nominated Dr. Willoughby, and both are to be regarded as agents of Dr. Willoughby. In the booth next to McDonald's was a window through which the ballots could be seen, if held up by the voters within. Davidson and Duncan, before the day of polling, had some arrangement by which voters were to be asked to hold up their ballots for the purpose of ascertaining by the aid of a spy-glass how they had voted. Davidson, it appears, had tried to use the glass from his own house, but said it would not work, and so it was to be used from McDonald's window. One voter (Otis Sammis) is proved to have held up his ballot for the purpose of inspection, pursuant to this arrangement. I incline to believe the statement of another (Allan Sabins) who swears that on the polling day Frank Davidson spoke to him about his vote, and told him he had a spy-glass in McDonald's back room, and asked him if he voted for Willoughby to hold up his ballot towards the window.

This scheme for violating one of the essential provisions of the Ontario Election Act, while it was an illegal act under section 146, and exposed the guilty participants to be punished by imprisonment, has no little significance when taken in connection with the proved acts of bribery already detailed. It suggests that agencies were at work to influence voters, and to provide for the corrupt compensation of those who by means of the exhibited ballot were certified to have fulfilled their engagements to vote for the respondent. I give a wider reading to the term "illegal practices" in sec. 159 than appears to have been present to the mind of Patterson, J.A., in the *Welland Case*, *ante p.* 383. In estimating the application of the provision of section 159 to this election, it appears to me impossible to leave out of sight the illegal practices under section 146.

Here the vote polled was about 4,500, out of which there was a majority of 51 for the respondent. In view of the

conduct and details of the contest which have been before us, I am not able to say that the result cannot reasonably be supposed to have been affected by the corrupt and illegal practices which have been proved.

According to the best opinion I can form upon the whole case, and applying the principles of the decisions cited to us on section 159, my judgment is that the election is and should be declared to be void.

As to costs, the general costs of petition and charges on which the petitioner succeeds should be paid by respondent as if these were the only charges; the costs of the charges on which petitioner failed to be paid by him and set off against the others.

OSLER, J. A.—I am of opinion that the evidence brings the case, as regards the question of Dr. Richards' agency, within the decision of the Court of Appeal in the *West Simcoe Case*, ante p. 153. We have here, as in that case, a person put forward as a candidate through the instrumentality of a political association, "the *modus operandi* being that delegates to a convention were chosen under what may be called the auspices of the (Conservative) Association, that the office of the delegates in convention was to select the candidate of the party, and that the respondent was the choice of the delegates in convention." The respondent was present at the convention, accepted the nomination, and, in doing so, made an address, in the course of which he not only accepted the nomination, but also asked the delegates whom he addressed to work for him in assuring the election. In the absence of any denial or explanation on his part, I think this is the fair inference from the evidence of Ewing, the secretary of the association. We have, therefore, the combination of circumstances which was held in the above case to constitute the delegates agents of the respondent for the purposes of the election; and there are in addition thereto other facts, noticed in the learned Chancellor's judgment, of a more directly personal character, which support a similar conclusion in the present case as to Dr. Richards.

It is unnecessary in this case to invoke the dicta of one of the learned trial judges in the case cited, and of the learned Chief Justice Cameron in the *Lennox Case*, *ante* p. 41, 61, which, as I respectfully submit, carry the doctrine of election agency, as regards delegates and other supporters of a party candidate, much further than the authorities warrant.

I take it that the law for us on this point is expressed in the language of Spragge, C.J.O., in the *West Simcoe Case*, concurred in by the majority of the Court of Appeal. He says (p. 159): "We see that it has been a common practice for the delegates to become active promoters of the election of the candidate whom they have chosen, by canvassing for him and otherwise. I do not mean to say that being delegates they are thereby constituted agents of the candidate, or that giving his candidature their active support afterwards has that effect. Strictly I take it that their duty is executed, and at an end upon their selection of a candidate; and if afterwards they canvass for him, or give him their support otherwise, it may be of their own free will; or it may be that they have been appointed to that duty by the Association. There are several instances in England of canvassers and other election agents being appointed by and acting for similar political organizations, for whose acts the candidate was not held responsible, unless he made them his agents expressly or impliedly, or ratified and adopted their acts. But at the same time we note the frequency of the change of the mere delegate to the active election agent; how in practice the one follows upon the other. It requires, I apprehend, less positive evidence of appointment, or recognition and adoption than in the case of one not a delegate."

It was shewn in that case, as I have said, that the candidate asked the delegates to work for him and aid in electing him, and this was held to be sufficient evidence of the appointment of the delegates present to act as his agents for the purpose of the contest.

I do not think the present case is distinguishable in its circumstances from the *West Simcoe Case*.

Two charges of bribery by Dr. Richards, viz., the bribery of John Noonan and Michael Shaughnessey, are clearly proved.

The agency of Richard Philp is not proved, but I think it is proved that he bribed John Calberry by paying him \$3 on the polling day. The only reasonable inference from the evidence is that it was paid to him for his vote.

With some doubt, I think we may hold that the payment to Rickson was an innocent one and dismiss that charge.

There is a charge of bribery of Joseph Robinson by Spence Ventris. The agency of Ventris is not proved; but I think upon full consideration that the fact of bribery is. The money was paid to Robinson on the morning of the polling-day. Ventris' explanation was that he paid it in settlement of a bill he owed to Frank Robinson, Joseph's son, for meat purchased from him nearly a year before. There was no other evidence of the existence of such an account, or of Joseph's authority to receive payment of it. Moreover, Ventris did not tell him that the money was for Frank, and he never afterwards told Frank that he had paid it. The explanation thus becomes merely incredible. It was invented for the occasion.

The petitioner was allowed to amend by adding a charge of bribery by John Goodfellow of Willet Palmateer to refrain from voting. The circumstances are suspicious, but I think fall short of proof. Goodfellow denies the charge. He says he did not ask Palmateer not to vote, but that Palmateer told him he did not intend to vote, and that he then said to him that he might as well come down and work for him at threshing peas. It may have been in his mind that this would clinch Palmateer's intention, and prevent him from altering it, but I am not convinced that there was any agreement or understanding on the subject, and the alleged overpayment is not so great as to compel belief in its corruptness, and to convict these two persons of bribery.

The next charge is one (made by amendment) of bribery of Franklin by Thomas Labelle. The evidence entirely fails to connect Labelle with the candidate, or with any agent of his ; nor, in my opinion, is bribery in fact proved. The case put forward by the petitioner was that Thomas Labelle, Reuben Labelle, (Chatterson) and Franklin, all came down from Toronto to vote for the respondent on a promise or understanding that their expenses would be paid. That some one telegraphed to these persons in the respondent's name is clear, but the contents of the telegrams, if they contained more than a summons to come down to vote, has not, owing to the misconduct of the manager of the telegraph company, been proved.

The respondent denied that he sent them, and I think it was proved by persons who saw the original messages before their destruction, that they were not in his handwriting. Franklin was paid \$5 at Colborne, and the suggestion was, that the others were also paid, Labelle being the hand to distribute the money, supposed to have been received by him for the purpose. Franklin, however, is the only one who is proved to have received anything. Labelle swears that the money so paid was his own money, lent by him to Franklin, because he had left his purse behind him in Toronto, and he swears that he paid his own expenses and paid nothing to Reuben, his brother.

There is literally no evidence that he received the money from the respondent, or from any one on his behalf, and he gives a not improbable account of how he might be possessed of money of his own, and so be in a position to assist Franklin at a pinch. So far as he was personally concerned, he had no inducement to bribe Franklin, who, like himself, was a voter coming at the request of some one else to vote for the respondent. He was not canvassing or taking any other part in the election. Nor, finally, as to this branch of the charge, is there any reason to suppose that the money was paid as a bribe. The offence, if any, in the direction of which the evidence points is that of payment of the voter's travelling expenses, but

this, except when done by a candidate or by a person on his behalf, is not an offence, and there being an absolute failure to trace in that direction the money paid by Labelle, the charge from any point of view falls to the ground.

The case is not free from suspicion, but it comes short of proof. I cannot say that Labelle impressed me as an untruthful witness, though he undoubtedly went far to discredit himself by his persistent avoidance of a subpoena.*

The result is that the election must be avoided in consequence of the corrupt act committed by Dr. Richards, unless we can hold it saved by the healing provision of section 159 (sec. 163 of R. S. O., 1887, ch. 9.)

So far as the respondent himself is concerned, I see no reason to suppose that he did not conduct the election with due regard to the requirements of the law. A considerable part of the trial was occupied in the inquiry into the personal charges made against him, which were numerous and were pressed with a good deal of earnestness, but which proved to be entirely without foundation, and can only be characterized as frivolous and vexatious.

But there were two gross cases of bribery by Dr. Richards, an agent of the respondent, another by Philp, and a fourth by Ventris, whose agency was not proved. There was also the illegal act, which I must regard as proved, to which Duncan and, I think, Davidson were parties, of inducing one or more voters to display their ballot papers after they had marked them, and of attempting to arrange a plan by which he and others might successfully do so. This plan failed, but its only conceivable object must have been to promote the carrying out of corrupt practices with regard to such voters.

I have already in the *North Ontario Case*, ante p. 1; the *East Middlesex Case*, ib. 250; the *East Simcoe Case*, ib. 291; and the *West Simcoe Case*, ib. 128, had occasion to consider section 159.

I need not repeat the views there expressed as to the

*The trial was several times adjourned by reason of the petitioner's failure to subpoena Thomas Labelle.

difficulties which oppose any intelligent or satisfactory application of it, except in comparatively rare and simple cases.

I am wholly unable to say that it can be properly applied to save the election in the present case. For the reasons given by my learned colleague, in which I fully concur, in dealing with the charges in the disposition of which we agree, it is impossible for me to affirm in the words of the section, that the corrupt practices were of such trifling nature, or of such trifling extent, that the result cannot have been affected, or be reasonably supposed to have been affected thereby.

The election must therefore be avoided. As to costs, the case is one in which they may be dealt with as in the *Prescott Case*, at *ante* p. 110. The respondent should pay the costs of the petition, and to the same extent as if the charges in respect of Richards, Ventris and Philp, and Allan Sabins and Otis Sammis had been the only charges upon which the petition was founded. As to the other charges on which the petitioner has failed, he should pay the respondent's costs.

We shall certify to the Speaker our determination that the election was void by reason of a corrupt practice having been committed by an agent of the respondent, without the respondent's knowledge or consent.

I shall also report to the Speaker (a) that no corrupt practice has been proved to have been committed by or with the knowledge or consent of any candidate at the election ; (b) That Dr. Nicholas Richards, John Noonan, Michael Shaughnessey, Richard Philp, John Calberry, Spence Ventris, and Joseph Robinson were proved at the trial to have been guilty of corrupt practices, that is to say of bribery ; and (c) that there is no reason to believe that corrupt practices have extensively prevailed at the election.

ALGOMA.

DOMINION ELECTION.

BEFORE THE COURT OF APPEAL.

Present—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

TORONTO, December 9, 1887.

January 10, 1888.

DANIEL FRANCIS BURK, *Petitioner*, v. SIMON JAMES
DAWSON, *Respondent*.

“*Dominion Controverted Elections Act*,” R. S. C. ch. 9, secs. 32, 33,
construction of—*Time for trial of petition—Extending time.*

The petition was presented on the 6th May, 1887, during a session of Parliament which ended on 23rd June, and issue was joined on 3rd June; no application was made or steps taken after that until the 6th December, 1887, when the petitioner applied to have a time and place appointed for trial and to have the time for the commencement of the trial enlarged.

The first part of sec. 32 of the Controverted Elections Act, R. S. C. ch. 9, is as follows :

“The trial of each election petition shall be commenced within six months from the time when such petition has been presented and shall be proceeded with from day to day until such trial is over ; but if at any time it appears to the Court or Judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament ; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included.”

Held, PATTERSON, J. A., dissenting, that the exception in the last clause is confined to a case in which the Court is satisfied that the respondent's presence is necessary ; “*such trial*” refers to a trial at which the respondent's presence has been declared to be necessary ; and no such declaration having been made in this case, the time of the session of Parliament was not to be excluded from the six months within which the trial was to be commenced.

It was not incumbent upon the respondent to move to dismiss the petition for default.

The Court could not *nunc pro tunc* declare that the respondent's presence at the trial was necessary.

Per Curiam, that the time for the commencement of the trial may be enlarged under sec. 33, notwithstanding the expiration of the six months ; but it had not been established in this case that the requirements of justice rendered such enlargement necessary ; and the Court refused to appoint a time and place for trial or to enlarge the time.

THE petition in this case was presented to the Court of Appeal on the 6th May, 1887. Preliminary objections were overruled on the 28th May, and the parties were at issue on the 3rd June. Parliament was in session at the time the petition was presented, and was not prorogued till the 23rd June.

After the disallowance of the preliminary objections, no step was taken or application made by either party until the 6th December, 1887, when the petitioner moved to fix a convenient time and place for the trial, and to extend the time for the commencement of the trial, which by R. S. C. ch. 9, sec 32, should be within six months from the presentation of the petition, unless enlarged by the Court or a Judge under sec. 33. This application was made in the first instance to a Judge in Chambers, and was by him enlarged before the full Court.

In support of the application the petitioner filed his own affidavit, which stated that the petition was presented in good faith, and that the charges made in it, or a large part of them, could be substantiated: that the respondent was a material witness on the petitioner's behalf, and that the latter could not safely proceed to trial without his evidence: that since the presentation of the petition the petitioner had been diligently employed in obtaining evidence, but had met with difficulties in doing so owing to the large size of the constituency: that the petitioner had relied upon the time for the commencement of the trial being computed so as to exclude the period of the session of Parliament; and that the application was made *bonâ fide* and not for the purpose of delay.

The respondent opposed the application on the ground that the trial not having been commenced within six months from the time when the petition was presented, and the time for commencing it not having been enlarged, the Court ought not now to appoint a day for trial, and further that it had not been shown that the requirements of justice now rendered an enlargement for that purpose necessary.

The argument was heard on the 9th December, 1887.

W. Cassels, Q. C., and *C. J. Holman*, for the petitioner.
McCarthy, Q. C., and *J. R. Roaf*, for the respondent.

January 10, 1888. HAGARTY, C.J.O.—I am of opinion the language used by the legislature (R. S. C., ch. 9, sec. 32) clearly indicates the direction that the trial of the petition shall be commenced within six months from the time of presentment, except that (1) when it is declared or decided by a Court or Judge that the respondent's presence at the trial is necessary, and then the trial shall not be commenced during any session of Parliament; (2) that in computing the time or delay allowed for any step or proceeding in respect of the trial or its commencement, the time occupied by such session shall not be included.

I read the words "such session," to mean the session previously referred to, *i. e.*, the session in which, but for such finding or direction of a Court or Judge, the time from which the six months would otherwise be reckoned.

In the case before us no such intervention of Court or Judge has taken place, and I hold that the six months must count from the 6th day of May, when, during a session, the petition was presented, and the time limited expired in November.

Beyond the disposal some time in May of certain preliminary objections, and the case becoming at issue about June 3rd, nothing whatever appears to have been done by the petitioner until the 6th December, when he applies to have a day fixed for trial. He has nearly seven months to prepare his case and his evidence, and has never even taken the common course of examining the respondent.

I cannot see that the latter was called on to take any step. If the petitioner had desired to prevent time running against him up to the 23rd of June, when the session terminated, I do not see why he might not, on affidavit declaring his requirement of the respondent's presence, have obtained an order from a Judge that the trial should not be commenced during the session, and then the time of such session would not have counted against him.

I think it clear that the legislature designed that these trials should be brought on with reasonable promptitude, partly for the reasonable protection of members against the long delay in ascertaining their rights, and partly in the interests of the electors, that it should be ascertained as soon as fairly practicable whether they were lawfully or unlawfully represented.

Sub-sec. 2 of sec. 32 seems clearly aimed against unexplained delays, declaring that if after three months from the presentment no day of trial has been fixed, some other elector may on application be substituted for the petitioner.

Both the interests of the parties and of the electors can be fully protected by the 33rd section, giving power to the Court or Judge to enlarge the time for the commencement of the trial on an application supported by affidavit, if the requirements of justice render such a course necessary.

I am unable to see that any case whatever is made out by the petitioner to induce the belief that the requirements of justice would be answered by our extending the time.

The affidavit produced is of the very vaguest character, and, for all that it states, the petitioner's exertions to discover evidence may have been limited to making inquiries of the various people that he may have met. Against his statement is the unexplained fact that he has allowed the whole open season, from early in May to the month of December, to elapse without any attempt to get a day fixed for the trial.

The peculiar position of this large constituency, in my judgment, rendered it more clearly the duty of the petitioner to be diligent in striving to have the trial during the open season, instead of practically throwing the trial over till next summer, after two sessions had passed, leaving a person whom he seeks to prove unduly elected to represent the constituency.

This dilatoriness seems wholly opposed to the apparent intentions of the legislature, and throws an appearance of unreality over the proceedings.

I do not think that Mr. Cassels' ingenious argument should avail him, as to the duty of the Court to fix days for trial on their own motion, without being asked so to do.

Granted their power so to do, we cannot ignore the fact that such a course has never been taken, and sec. 13 is very plain in directing that when the petition is at issue the Court may, on the application of either party, fix a day for trial. Nor do I think it necessary that there should be a motion to dismiss.

All we see is that the six months have elapsed, and that no case has been made out for our exercising the statutable powers of extending the time.

I cannot accede to the argument that at any subsequent stay of the proceedings, and after the lapse of the six months, the petitioner can suggest that the session should not be reckoned against him because the attendance of the sitting member at the trial was in fact necessary.

BURTON, J. A.—In this case the time for the trial of the petition against the return of the sitting member expires, if the session of Parliament is excluded from the computation, on the 22nd or 23rd of December; if on the other hand it is included, it ran out in November last.

An application is now made to fix the day for trial which even at the time of the application could not have been fixed for an earlier date than the 22nd, and, as matters now stand, would necessitate an application for an enlargement.

We are therefore called upon to place a construction upon secs. 32 and 33 of the Controverted Elections Act of the Dominion, the language of which has given rise to so much difference of opinion.

Tracing the history of the enactments relating to these controverted elections, we find that originally no time was limited for proceeding with them, which was felt to be a great hardship, and the same Act which was passed to prevent a trial going on in certain cases during the sitting of Parliament, contained for the first time the six months' limitation.

Whilst I quite agree that this limit of time is purely arbitrary, and that we have no means of knowing, except from the language employed by them, whether, as a matter of policy, Parliament intended that it should be that period absolutely, or that period with the term of the session added, we may fairly look at the rest of the Act to aid us in the construction of the sections in question, and we find throughout unmistakable evidence of the desire of Parliament that the proceedings upon these petitions should be dealt with summarily, and as expeditiously as the forms of law would permit.

Thus the petition must be filed within thirty days after the return of the member is published in the *Gazette*.

That it must be served within five days.

That preliminary objections, if any, must be presented and filed within five days, and decided at once in a summary manner.

And within five days after the preliminary objections are disposed of, or within the time for presenting the same, if none are presented, the petition, whether answered or not, shall be held to be at issue, and the Court may fix a convenient time and place for trial.

Then comes the direction that the trial shall be commenced within six months, and proceeded with from day to day until such trial is over. So far, of course, there is no room for question; but the section proceeds: "But if at any time it appears to the Court or a Judge, that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament."

This appears to be a distinct recognition on the part of the legislature that the trial may proceed during the session in any other case except that in which the Court has been satisfied that the respondent's presence is necessary, and that the exception is confined to such a case. If that be so, the rest of the section is intelligible enough. The words are these:

"And in the computation of any time or delay allowed for any step or proceeding in respect of any *such* trial, or

for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included."

That is to say, all trials are to be commenced within six months, unless in the one excepted case; and in that case the trial is not to be commenced during the session, and as to *such* trial, that is, the case in which the Court has been satisfied that the respondent's presence is necessary, the time of the session shall not be computed for any purpose.

If the legislature had intended that in no case should the time of the session be included, what easier than to have added immediately after fixing the six months: "But in the computation of such six months the time of the session shall not be included."

I see no difficulty in this construction arising from sub-sec. 2. It is quite consistent with it. If any petitioner has failed for three months to bring his case to trial, any other person may be substituted; but it would be a good answer to any such application, that the Court was satisfied that the presence of the respondent at the trial was necessary.

The decisions referred to in the *Kingston Case*, 39 U. C. R. 139, and the *Addington Case*, 39 U. C. R. 131, were upon the 38 Vic., before consolidation; and an attempt has been made by the framers of the consolidated Act to remove the doubts which had been raised upon them, apparently not very successfully, although the weight of judicial opinion appears strongly to preponderate in favour of the view which I am taking of it.

Sec. 33 has a general application to all cases, and gives power to enlarge the time for the commencement of the trial, if, on an application for that purpose, supported by affidavit, it appears that the requirements of justice render such enlargement necessary.

But for the doubts which have been raised by some Judges whose opinions, I admit, are entitled to very great respect, I should have thought the meaning of the enactment clear.

Although in arriving at this conclusion we must be governed by the words of the statute without any aid from its parliamentary history, still having come to a certain conclusion upon its language, it is not unsatisfactory to find that that conclusion is supported by what took place during its passage ; leading members on both sides of the House apparently conceding that where the presence of a member was not necessary at the trial, there could be no object in the trial not proceeding during the session ; but that the question whether a trial should proceed during the session might safely be left to the Judges.

Being then clearly of opinion that in the present case the parties have not brought themselves within the exception ; the time expired in November last, and no effort was made during that time to bring the case on for trial ; nor has any effort been made to fix a day for trial until the last moment of the extended period, when it is admitted that the case cannot be tried without an enlargement ; in my view of the law and the manifest intention of the legislature, that these trials should be speedily disposed of, I think we ought not to accede to the present application, but should dismiss it, and I think with costs.

PATTERSON, J. A.—The question upon the construction of R. S. C. ch. 9, sec. 32, is one which may, either directly or incidentally, arise for decision by any one of the Courts mentioned in the second section of the Act, or by a Judge in Chambers upon an application under section 33, or by the Judge at the trial of a petition. In the last mentioned case it is at least doubtful if an appeal lies to the Supreme Court under sec. 50. In the other two cases the doubt is even stronger. It is therefore to be regretted that there should be room for difference of opinion respecting the meaning of the language employed by the legislature.

The provisions in discussion were introduced into the law in 1875, by 38 Vic. ch. 10, secs. 1 and 2.

The present question is whether the six months limited for the commencement of the trial are to be in all cases

computed exclusive of the time occupied by a session of Parliament, or computed only when an attempt has been made to bring on the trial during the session, and has been frustrated by its being made to appear to the Court or a Judge that the respondent's presence at the trial is necessary.

The sections, both in their original form and in the re-drafted shape in which they now appear in the R. S. C. as secs. 31, 32, and 33 of the Dominion Controverted Elections Act, have given rise to one or two other questions of some nicety, which have not always been answered in the same way.

I do not propose to touch upon those other questions, but shall confine my observations to the one directly before us.

The provisions in question were considered in 1876 by our Court of Queen's Bench in the case of the *Addington Election*, 39 U. C. R. 131, when Sir Adam Wilson, who delivered the judgment of the Court, formulated his construction of them in seven propositions, one of which is thus reported: "6. In the computation of the six months, any delay allowed for any step or proceeding in respect of the trial, or for the commencement of the trial, the time occupied by any session of Parliament shall not be reckoned." This is laid down as a general proposition, and not as confined to cases where it had been desired or attempted to bring on the trial during the session. Proposition 7 indicated yet more strongly the liberality of construction applied to the limitation of time. It is alluded to in the following passage from the judgment in the *Kingston Case*, delivered by the same learned Judge at the same sitting (39 U. C. R. 139, 145.) He said: "I have already considered this part of the case in the *Addington Case*, and it is unnecessary to say more than that my opinion is that * * the petitioner is entitled to have excluded from the computation of the six months all such time as the Parliament is in session, and such time as the Judge who is to try the petition is engaged in the term business of his Court."

It has been said that the learned Judge who pronounced these judgments had in the *Glengarry Case*, 12 C. L. J. 117, expressed a different opinion. I do not so read the report of that case. The petition there in question had been filed in the beginning of August, 1875, the six months therefore running until the beginning of February, 1876. The trial was fixed for the 25th of January, 1876, within a few days of the limit, and the motion, which was heard and disposed of on the 19th of January, was to extend the time beyond the six months. The extension was refused because the grounds relied on were insufficient. The learned Judge, in order to shew that an extension would unavoidably put off the trial for an unreasonable time, called attention to the fact that the trial could not take place during the session then approaching, which would probably last till May, nor during Easter Term which would follow closely on the close of the session; but the session formed no part of the six months, and no allusion was made to the question now before us.

We have been furnished with copies of judgments pronounced by Chief Justice Allen in New Brunswick, Chief Justice Wallbridge in Manitoba, and Mr. Justice Caron in Quebec, in which a different reading was given to the statute. Mr. Justice Caron cites opinions of Chief Justice Wilson, Chief Justice Galt, and Mr. Justice Morrison, as being in accord with his view. He does not mention the cases in which those opinions were expressed, and after reading the judgments in the *Addington* and *Kingston Cases* from which I have quoted, and in which Mr. Justice Morrison concurred, I cannot help thinking that the learned Judge must have been incorrectly informed.

With all respect for the opinions of those who differ from me, and fully recognising the force of the considerations on which their views are founded, I think the correct interpretation was put upon the statute in the cases in our Court of Queen's Bench.

The argument against it is put on two grounds—the policy attributed to the statute to secure a speedy disposi-

tion of the election contest, and the reading of the language itself.

Conceding the policy, as it may well be conceded, I am unable to see that the argument is much advanced by so doing. There is no charm about the period of six months. The limitation of time is purely arbitrary. Whether the choice of the legislature fell on three months, or nine months, or six months, or six months plus the time of the session, the principle is precisely the same. It is an arbitrary limitation, and the question is what is the limitation?

The respondent is not tied up, for he is at liberty to apply at any time after issue, under section 13, to have a time fixed for the trial.

There is a slight difference in the language, as the statute is now arranged, from what it was in its original form; but the effect, if altered at all, is rather more in favor of the construction I adopt, than when discussed in the *Addington Case*.

I see no necessity for reading the third branch of section 32 as being qualified by the second, nor any difficulty in giving each its own literal interpretation.

The words are "and in the computation of any time or delay allowed for any step or proceeding in respect of such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included."

"Any such trial," means the trial of the election petition, and is not by any grammatical exigency confined to a trial at which the presence of the respondent has been made to appear to be necessary.

"The commencement thereof *as aforesaid*," means the commencement within what the statute describes as six months from the time the petition was presented. The direction is as to the mode of computing that period of six months. You are not to include in it the time of the session.

The prohibition against conducting the trial during the session has no necessary connection with the limit of

time beyond which it is not to be delayed ; nor does the juxtaposition of the two provisions make it necessary to read the latter as subject to the same contingency as the former.

We have a practical illustration of this in our cognate provincial enactment, to which I am about to refer. To hold that the limitation is contingent, like the prohibition, on the necessity for the respondent's presence at the trial being made to appear to the Court or a Judge, requires us to read into the statute something which I do not find there, to say nothing of the necessity involved for a collateral proceeding and a certain amount of outlay, before the limitation which is to apply to any particular petition is ascertained.

For these reasons I think we should hold, as was held in the Queen's Bench, that the time of the session is not to be counted.

The policy of the Dominion Act, in the particular we are discussing, seems to have been adopted by our local legislature, in passing, in 1876, the statute 39 Vic. ch. 10. The 30th and 31st sections of that Act are analogous to the first and second sections of the Dominion Act of 1875, but are not identical with them. We cannot, of course, treat one of these Acts as throwing light on the other ; yet it is not undeserving of notice that, while the same limitation is adopted, it is not affected by the contingency which is so much insisted on under the Dominion Act. Section 31 began thus : " The trial of an election petition shall not (without the consent of the candidate declared to be elected) be held during a session of the Legislative Assembly, or within fifteen days after the close of the session ; and in the computation of any delay allowed for any step or proceeding in respect of the trial, or for the commencement of the trial under the next *following* section, the time occupied by the session shall not be reckoned." The time referred to was fixed by the *preceding* section, not the *following* one, and was six months, as in the Dominion Act. The section was amended in 1877 by 40 Vic. ch. 7, sched. A (7) but not in anything at present material.

It is not essential that the practice in local election contests should be the same as contests respecting Dominion elections. It is, however, similar in its general features, and it is obviously convenient that it should be so. The local limitation of six months being clearly exclusive of the time of the session, it would be proper to construe the Dominion Act in the same way if the arguments for and against that construction were evenly balanced.

The policy of the provision, as apparently understood and as adopted by our legislature, agrees with the construction given to the Dominion Act in the *Addington Case*, which is the construction that commends itself to me as correct, and on which, in my judgment, we should act.

But as this opinion is not that of my learned brethren, I have merely to add that, assuming the rigid limit of six months to apply, I do not dissent from the conclusion that no sufficient case for an extension has been made out.

OSLER, J. A., (after briefly stating the facts.)—The principal question is whether the time occupied by the session is to be computed in the six months. If, as the petitioner contends, it is not to be computed, he is, (or was on the 6th instant, when he brought on his motion, and should now be so treated,) still in time to have a day fixed within six months from the prorogation, and it would not now be necessary for us to determine whether the time should be further enlarged. That would be a matter for subsequent consideration. If, however, the time occupied by the session should be computed, the further question arises whether we ought, under all the circumstances, to enlarge the time for the commencement of the trial, as the six months from the presentation of the petition have, in that case, long since expired.

The first question turns upon the true construction of section 32, and sub-section, of the Controverted Elections Act, R. S. C. ch. 9. I do not like to say that the true meaning is plain, as we do not all take the same view of

it, but I will state what, to me at least appears to be the plain meaning.

One object of the legislature undoubtedly was, that these election petitions should be disposed of or brought to trial promptly, and six months from the presentation of the petition was considered, subject to special circumstances, to be an ample time limit for that purpose.

Now examine the language of the section. I take it as it stands in the revised Act, as I do not think we derive any assistance either way from the language of the original statutes :

“ The trial of every election petition shall be commenced within six months from the time when such petition has been presented.” That is a plain, clear, and general direction. Passing over the direction that the trial shall be continued from day to day, we take up the next clause of the section, transposing its members without altering the sense : “ Such trial shall not be commenced during any session of Parliament.” Looking at that alone, it would exclude the session ; but it is subject to the qualification, “ if at any time it appears to the Court or a Judge, that the respondent’s presence at the trial is necessary.”

Unless, therefore, this is made to appear by the petitioner or respondent, the trial must be commenced within six months from the specified date.

Then the section concludes, “ and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included.”

This, it is argued, is an independent enactment, that the time of the session shall in all cases be excluded. That, however, is not an admissible construction, as it would make the clause inconsistent with the earlier part of the section, though it is capable of one which harmonizes with it. The natural, and, as it seems to me, obvious meaning is, that the trial referred to in this latter branch of the section is one at which the respondent’s presence has been

declared or held necessary by the Court or a Judge, on that fact having been made to appear. In such case the time of the session is not to be included. In other cases the first part of the section has full scope, and the general rule applies.

The substance of the whole section, in short, is this : The trial of a petition is to be commenced in six months from the date of its presentation, but not during any session of Parliament which may occur during that period, if the respondent's presence at the trial is necessary, and the Court or Judge so declares. When that is the case the time of the session is to be excluded from the computation of the six months.

Sub-sec. 2 of sec. 32 bears out this construction. The petitioner is *primâ facie* in default, if he has not within three months *from the presentation of the petition* procured a day to be fixed for the trial, and any elector may in that case apply to be substituted for the petitioner, on such terms as to the Court or Judge may seem just. It would, I take it, be an answer to the application to shew that the petitioner was not in default by reason of the occurrence of the session, and the necessity for the respondent's presence at the trial, and therefore that the time was not running against the petitioner. But if that excuse was not shewn, the three months (the first three of the six) would be running, notwithstanding the session, and failing some other sufficient excuse, a new petitioner might be appointed.

These considerations appear to meet the argument that the Court may, as it were, *nunc pro tunc* declare that the respondent's presence at the trial was or is necessary. Such an order is only intended to be made prospectively, to postpone a contemplated trial, and to excuse it from being brought on during the session.

In holding, as I do, that on the facts presented to us in this case, the six months mentioned in section 32 have expired, I am in accordance with the decisions which have been pronounced by all the Courts of the other Provinces which have had occasion to consider the question

I think the respondent was not bound to move to dismiss the petition, and that he may properly oppose this motion on the ground that the petitioner is out of time, and unable to have a day fixed for the trial unless the Court accedes to his application to enlarge the time; and this brings me to the second question above stated, which is, whether we ought to do so.

We have recently held in the *Kingston Case*, (not reported) that the time may be enlarged under section 33, notwithstanding the expiration of the six months. The petition is not out of Court, and, having regard to the interpretation clause, section 2, and to section 35, and the construction which has in other cases been placed on language similar to that of section 33, I think it reasonably clear, that the power to enlarge is not necessarily to be exercised only within the six months, but may, in a proper case, be exercised after that time has expired. I refer to *Wuzeler v. Gibbs*, 3 S. C. R. 374; *Banner v. Johnston*, L. R. 5 H. L. 157, 170, 172; *Lord v. Lee*, L. R. 3 Q. B. 404.

What the 33rd section enacts is, that notwithstanding the stringency of the 32nd section, the Court may from time to time enlarge the time for the commencement of the trial, if on application for that purpose, *supported by affidavit*, it appears that the requirements of justice render an enlargement necessary. Clearly, therefore, it is not a matter of course; a sufficient case must be made out upon affidavit. On the one hand, it is desirable that corrupt practices should be punished and a person who has gained his seat by improper means should not be permitted to retain it: and on the other, that the representation of the constituency in Parliament should be finally settled as soon as possible, and the right of the sitting member left in doubt no longer than can be avoided. When the petitioner seeks to enlarge the time which the legislature has prescribed as *primâ facie* the extreme limit for the commencement of the trial, he is really asking the Court to declare that the former consideration is still to be regarded

as the paramount one, notwithstanding the delay. In a case like the present, where his course has been marked by almost absolute inaction, it is not too much to ask that he shall at least condescend upon some particulars of the charges relied upon, so as to enable the Court to judge of their importance, and should also furnish some satisfactory reason why they have not sooner been brought to trial. Unless at the time the petition was presented the petitioner had some knowledge, more or less accurate, of the existence of particular corrupt practices, they ought not to have been charged. If they were known, what reasonable excuse is there for not having been more diligent? It was never intended that the petition should be kept open for the purpose of fishing for new charges, and making a case of which the petitioner was ignorant when he presented it.

Here the petition contains many precise charges of irregularities which may or may not have affected the result of the election, but they were known to the petitioner in May last, if not before, as well as they are known to-day. Why have they not been proceeded with? There is no satisfactory explanation of that.

The result of an enlargement would be to hang up the petition for nearly another year, as it could not well be tried before the next long vacation.

I think the petitioner has entirely failed to shew that the requirements of justice render an enlargement necessary, and am therefore of opinion that both motions should be refused.

WEST MIDDLESEX.

DOMINION ELECTION.

BEFORE FALCONBRIDGE, J.

STRATHROY, *December 13, 14, 15, and 16, 1887.*

MCNEIL V. ROOME.

Hiring vehicles—Conveying voters to poll—Livery stable-keepers—Partnership—Corrupt practice—R. S. C. c. 8, secs. 88, 91.

W., an agent of the respondent, was in partnership as a livery stable-keeper with G. Under an agreement between them if either partner took out carriages for his own use he was to pay his co-partner half hire for them. On election day W. took out carriages of the partnership and conveyed voters to the poll, and afterwards, after the election, duly accounted to G. for half hire for the same.

Held, that this constituted a corrupt practice under R. S. C. c. 8, secs. 88, 91, being a hiring of carriages to carry voters to the poll, and that the election of the respondent was void.

Semble, that R. S. C. c. 9, s. 33, sub-sec. 2 does not prevent a Judge proceeding with the trial of an election petition pending the sitting of the Divisional Court of which he is a member.

THIS was an election petition arising out of the election of a member for the electoral District of the West Riding of the county of Middlesex, holden on February 15th and 22nd, 1887, at which William Frederick Roome, physician was declared duly elected.

The petitioner was one John McNeil, a duly qualified voter at the said election, and who in his petition set out the usual allegations of corrupt practices and illegal acts by the respondent and his agents, and amongst other things that the respondent by himself, his agent or agents, and other persons on his behalf, was guilty of the corrupt practice of wilfully hiring and promising to pay for, and paying for horses, teams, carriages, cabs, and other vehicles, to convey a voter or voters to or from the poll, or to or from the neighbourhood thereof at the said election, and prayed that

it might be determined that the respondent was not duly elected or returned, and that the election was void, and that it might be declared that he was guilty of corrupt practices and incapable of holding any office in the nomination of the Crown or of the Governor General under the provisions of sec. 102 of the Dominion Elections Act, 1874, and of sec. 96 of the Dominion Elections Act.

The particulars delivered contained many charges of corrupt practices, all of which were, however, dismissed at the trial except charges 14 and 42, judgment as to which was reserved.

Charge 14 was, that Thomas Gough and John B. Gough, agents of the respondent, offered and paid George Kennings \$3 to induce him to vote for the respondent.

Charge 42 is fully set out in the judgment.

The trial took place at Strathroy, on December 13th, 14th, 15th, and 16th, 1887, before Falconbridge, J.

S. H. Blake, Q. C., and *C. J. Holman*, for the petitioner.

W. R. Meredith, Q. C., *H. Becher*, Q. C., and *McNeil*, for the respondent.

At the commencement of the trial, the learned Judge called attention to the fact that a question had arisen as to his jurisdiction to try this case by reason of sec. 33, subsec. 2 of R. S. C. ch. 9, the Dominion Controverted Elections Act, which enacts: "No trial of an election petition shall be commenced or proceeded with during any term of the Court of which the Judge who is to try the same is a member, and at which such Judge is by law bound to sit."

He, however, expressed his view that the section was passed previously to the Judicature Act, by which all terms were abolished; and that, moreover, he was not aware of any law binding him to sit in a Divisional Court, if there was a quorum of that Court without him.

Counsel for both parties concurred in this view of the law, and waived any objection to his Lordship's jurisdiction on any such ground.

As mentioned in the judgment, counsel were allowed to put in a written argument.

The written argument as to charge 14, was simply a comment on the evidence.

The written argument of the respondent in respect to charge 42, so far as it is necessary to set it out here, was as follows :

The result of the inquiry has been to establish that the election was a pure one ; that the respondent honestly desired that no improper expenditure should be incurred or illegal act committed on his behalf, and that the election has been conducted by himself and his supporters in accordance with the law. It is sought to set it aside for an alleged technical violation of the section relating to the hiring of teams, where every precaution was taken by the respondent and those who were furthering his election to prevent any such violation, and to keep within the letter as well as the spirit of the law.

The cases establish that in order to set aside an election which has been so conducted, and in view of the penal character of the charge, it must be made out in every particular clearly to the satisfaction of the tribunal before which it is investigated: *The Wigan Case* 1 O'M. & H. 188 ; *The East Toronto Case*, H. E. C. at pp. 95, 96 and 97 ; *The West Toronto Case*, 1 H. E. C. at p. 123. The charge being penal in its character, strict proof of it should be required.

The offence against which the statute is directed is the hiring or promising to pay or paying for any horse, team, or carriage, cab or other vehicle by any candidate, or by any person on his behalf, to convey any voter or voters to or from the poll, or to or from the neighbourhood thereof at any election," if the offence be a wilful one. Now the evidence shews that the horses and vehicles were volunteered ; that the understanding between Wilkins and the respondent's agents was, that no charge should be made for them. * * It is not pretended that there was a hiring unless Wilkins can be said to have hired the horses and vehicles from the firm of which he was a member. The evidence taken most strictly against the respondent does not establish this ; the most that is shown is, that when the partnership was formed, an understanding was come to between the partners that when one of them took out "a rig," he was to allow the other partner his share of what the profit would have been if it had been let to a stranger. * * At the very utmost, even if the arrangement spoken of by Gustin, can be connected with the use by the respondent of the horses and vehicles, it amounted not to a hiring, but to an agreement that one partner should indemnify the other for the loss sustained by him because they were not hired. How can it be said that there was a hiring of a vehicle, assuming that there

ould be a hiring by a partner from his firm, it was not of a horse or a vehicle, but of the undivided interest of Gustin in it? There was not and could not be a hiring by one partner from the firm of which he was a member. It is not as if the partnership had been a corporation—here it is alleged that Wilkins hired practically from himself. The cases of *Holmes v. Higgins*, 1 B. & C. 74; *Donaldson v. Williams*, 1 C. & M. 346; *Lucas v. Beach*, 1 Sc. N. R., per Tindal, C. J., at p. 357, show that no action could be brought by Gustin upon the facts as put by him for the hire of the horses and vehicles in question. And it is submitted that it is a fair test to say that if Gustin could not have sued his partner on a contract to pay for the hire of them, there was no infraction of the Election Act in what was done.

The hiring must be of “any horse, &c., to convey any voter or voters to or from the poll, or to or from the neighbourhood thereof at any election.” Strict proof should be required that the hiring was for the prohibited purpose—the conveyance of voters to the poll. There is no evidence to shew this; none of the witnesses say that they were hired or got for any such purpose. * * The number of vehicles supplied was small, and they may have been used for purposes other than those mentioned in the statute: *West Toronto Case*, H. E. C. 97, at pp. 120-121; *North Victoria Case*, H. E. C. 352, at pp. 260-261; *Halton Case*, H. E. C. 736, at pp. 740-741.

If the petitioner is driven to rely on the payment made by Wilkins to Gustin, and if that can be said to have been a payment for horses, &c., to convey voters, &c., which for the reasons already given, it is submitted that it cannot, the payment having been made after the agency of Wilkins, if he ever were an agent, had ceased, it is clear that the respondent is not affected by it. On this point the respondent relies on the authorities cited at the trial. That the payment was after the election, is shewn by the evidence.

The act was not, at all events, a wilful one. See observations of Mr. Justice Patterson in the *Halton Case*, H. E. C. 736, at p. 741; *Young v. Smith*, 4 S. C. R. 494, may be cited as opposed to this view, but the circumstances of that case differ very much from those of the *Halton Case*, and this case is very similar to the latter one in principle. Then as to the question of the agency of Wilkins. It is submitted that the acts said to have been done by him in connection with the election, did not constitute him an agent of the respondent: the *East Peterborough Case*, H. E. C. 245, at p. 247; as to the *Birdsall Case*, and the *North York Case*, 1 H. E. C. 63.

The reply of the petitioner to the above, so far as it is necessary to set it out, was as follows:

The fact that all the horses of the livery stables of Wilkins & Gustin were out on polling day engaged in carrying voters to and from the polls, is clearly established by the evidence. * *

The hiring and paying for the horses, teams, carriages, &c., were clearly established by the evidence. * *

Was it wilful? This point is fully covered by the decisions of the Supreme Court. See *The Selkirk Election Case*, *Young v. Smith*, 4 S. C. R. 494. The Chief Justice, at page 503, says: "Here the illegal act was done without any legal excuse, and without any ignorance or mistake in fact, and consequently it was a wilful breach of the law, and consequently a corrupt act." And at page 204: "If a man voluntarily breaks the law this, in the eye of the law, is a wilful act because the act done is a wrongful act without just cause or excuse. To deprive an unlawful act of wilfulness, there must be an ignorance or mistake of fact, not excuse or error in point of law."

Mr. Justice Gwynne, at page 514, says: "Now that the hiring here was wilful, that is, intentional, there can be no doubt, and the excuse that the party doing it did not know that it was made a corrupt act, or that it was an illegal act, cannot be received without frustrating the intent of the legislature by a judicial repeal of the Act—*ignorantia juris non excusat*."

See *Hickson v. Abbott*, 25 L. C. J. at page 313; *Re North Simcoe*, H. E. C. 50, *Re Prince Edward*, *ib.* page 45; *Cooper v. Slade*, 6 H. of L. Cas. 746; *Re Halton*, H. E. C. 736.

To go no further, the agency of Wilkins is clearly established. * *

See the *Wakefield Case*, 2 O'M. & H. 102. Agency is sufficiently established if it is shewn that the party promoting the election was canvassing and doing acts tending to promote the election provided the candidate or his authorized agents have reasonable knowledge that these persons are so acting with that object.

The contention put forward by the respondent that the fact of Wilkins being a member of the firm itself, alters the legal effect, is not well founded. It would carry the proposition to this absurdity that if a shareholder in a railway company paid the railway fare of voters it would not be a corrupt act because the shareholder would receive some return in the way of dividends from the railway, and consequently it was not a full payment for the particular ticket. The question under the statute is not, how much has been paid in this way, but has anything been paid? has there been any violation of the statute? The agreement between the partners was one formed before the election, and was subsisting every moment during the election, and when the rigs were given to Wilkins on polling day, there was the promise then existing on his part to pay Gustin therefor. The bargain was complete before the conveyances were used at all.

There are many suspicious circumstances in connection with the hiring of these livery rigs on election day * *

The following cases are relied upon: *Re North Ontario*, H. E. C. at pages 789, 790; *ib.* at page 197-205; *Re Cornwall*, *ib.* page 548.

The suggestion made by the respondent as to the liability between the partners, is not applicable to the present case, in that the rigs were actually paid for, and the case comes exactly within the letter of the statute.

February 13th, 1888. FALCONBRIDGE, J.—Charge 14. I do not think this charge is sustained by the evidence, and I therefore dismiss it.

Charge 42 is, “On or shortly before the day of the said election, the exact day not being known to the petitioner, the respondent and Alexander Johnston, of the town of Strathroy, banker, William J. Johnston, of the same place, merchant, and one Wilkins, of the same place, livery keeper, agents of the respondent, and other persons, agents of the respondent, or some of them, hired from Wilkins and Gustin, of the said town of Strathroy, livery keepers, horses, teams, carriages, and cutters, and other vehicles, for the purpose of conveying voters at such election to and from the polls on the day of polling, and the said persons above mentioned, or some other agent of the respondent, paid the said Wilkins and Gustin for the use of the said horses, teams, carriages, and cutters, and other vehicles, at the said election.”

Soon after the reservation of the case at the hearing, the parties asked leave to put in a written argument, which has recently been done, and I now proceed to give judgment.

The effect of the evidence is as follows :

George Gustin—Livery-stable keeper, carrying on business at the time of the election in partnership with George Wilkins. Their “rigs” (nine in number) were all out and working on election day. Their book shewing the entry of that date was produced, with the date February 22nd changed to 21st. It did not appear who made the alteration. Four of these “rigs” appeared to be charged to Mr. Johnston. On turning up Mr. Johnston’s account in the book, these rigs appeared charged and were marked on the opposite page as paid. The witness swore they had not been paid for by Johnston, and gave the following explanation :

“Q. How were they paid for? A. I told him they were paid for. Q. What explanation do you give in regard to this? A. The bargain Wilkins and I made when we started in together was, when he got a rig out he was to give me half, and if I took a rig out I was to pay him half. I took a rig there that day. I paid him half on it, and the rest of the rigs Mr. Wilkins paid me half on it; the man in the stable put them down as they went out. * * * Q. Has every rig on that page, including the election day, been paid for? A. I received my half of them; I had only half share interest. Q. I ask you have all these rigs been paid for? A. I cannot say; that on the opposite page indicates I got my share of it. Q. Who paid you that? Mr. Wilkins paid me my half. * * * Q. Did you or did you not offer to give them on election day for nothing? A. No, I got paid for my half of them. Q. You got paid for your half of all the rigs on election day? A. I got paid for my half certainly; that is what I said before.”

In cross-examination he said he was a Reformer and was not in any way paid for those rigs except by Wilkins allowing him one-half in settlement of account.

Geo. Wilkins—A Conservative and a strong supporter of the party swore he volunteered the rigs on election day for nothing for the benefit of the Conservative cause.

Q. And they were in use all that day? A. I would not be sure, but I think so; I was not there. Q. For carrying voters to the polls? A. Yes, sir. Q. You believed they were used for that purpose? A. Yes, sir.

He says he does not know who changed the 22nd to 21st.

The witness took one of the rigs marked “Lulu and buggy,” and drove out into Adelaide, and voted himself in No. 1 ward. He took a voter named Bugler to the polls. He was driving about himself before the election day to see men to get them to vote for the respondent, and those teams are charged for in the account rendered to and paid by respondent or his financial agent. Two or more of the teams so charged for in the account do not appear in the book at all.

Q. Did Mr. Gustin receive his share for these teams? A. He received his proper share. Q. He got half? A. Yes. Q. Who paid it to him? A. I did. Q. For those on polling day? A. I paid him myself. Q. Paid him in hard cash? A. Yes, in hard cash. Q. You remember that particularly? A. Yes, of course I do. Q. Didn't Mr. Roome think it

strange you were charging for rigs used by yourself in this account? A. I never spoke to him about it. Q. Did you explain to Mr. Roome what you used these for? A. I do not know I did. Q. You did not ask him to pay you for driving around for your own pleasure—did you explain to him? A. Very likely I did. Q. Did he pay the account without asking any questions? A. He did not pay me at all; I think it was Mr. Lenfesty paid me. Q. I want to know, did you or anybody check this account, or did they just take the account and pay it? A. I daresay they kept account of their own. Q. How did they keep account—take your word for it? A. Mr. Lenfesty knew I was working for the doctor. Q. How did he know it? A. I told him. Q. When? A. Sometime in Strathroy, I believe.

He says, further, that Wm. Johnston and Alex. Johnston knew he was working for the respondent, and that he saw the respondent once or twice during the campaign and told him he was working for him, and attended a meeting at Glencoe where the respondent addressed the people and asked them to support him and see him elected.

On cross-examination, he said he was not a member of a committee and would not be sure he told the respondent he was working for him, but thought he did: that he did not know whether he told the respondent, or any one connected with him, of the arrangement between witness and Gustin; and that the settlement with Mr. Gustin was after the election.

Alexander Johnston, who had been proved to be an agent of respondent, swore there was no arrangement made that Wilkins should be paid for teams used to get out the vote on election day.

Cross-examined:

Q. * * Did you check over the account of Wilkins & Gustin? A. I think I did; I think I saw them. Q. Did you go over it item by item, or pay it as presented? A. I went over, I think, with Mr. Wilkins item by item. Q. Are you sure of that? A. I think so. Q. I see on the 16th of February Mr. Wilkins charges for "Bob and buggy, \$2.25." Did you allow that for him to go around on his own pleasure? A. I do not know I checked it over item by item, but I saw the account. Q. Didn't you think it strange Mr. Wilkins should charge five or six teams for his own use, and charge the respondent for them? A. I think he was certainly engaged in canvassing.

Alexander Johnston has shewn by evidence given on this and other charges (and which evidence, it was agreed, was to be applicable to all the charges), to have been an agent, and a very active and prominent worker for the respondent.

I am of opinion that I must, on the evidence given on this charge, part of which is above set forth, hold George Wilkins to have been an agent for the respondent. Mr. Johnston knew he was engaged in canvassing, and after the election passed without question items of Wilkins & Gustin's account making charges for teams used by Wilkins during the campaign. Wilkins himself swears (although he modifies this statement somewhat on cross-examination, and respondent denies it), that he told respondent he was working for him, and he attended one meeting, and perhaps two, where the respondent addressed the people, and asked them to do all they could for him. By sec. 88, of R. S. C., ch. 8, "The Dominion Elections Act," it is provided that :

"The hiring, or promising to pay, or paying for any horse, team, carriage, cab, or other vehicle, by any candidate, or by any person on his behalf, to carry any voter or voters to or from the poll, or to or from the neighbourhood thereof, at any election, * * are unlawful acts."

And by sec. 91, * *

"Any wilful offence against any one of the seven sections of this Act next preceding are corrupt practices within the meaning of this Act."

I cite the Revised Statutes for the sake of convenience.

It is clear to my mind on the evidence that the "rigs" were used to carry voters to and from the polls.

It remains to consider whether there was any hiring, &c., within the meaning of the section. As to this I would entertain no doubt were it not for respondent's contention that the fact of Wilkins being a member of the firm alters the legal effect, and renders that a harmless and an innocent transaction which would otherwise be clearly within the mischief intended to be provided against.

I cannot give effect to this contention. This agreement

between the partners subsisted long prior to the election, and at every instant up to that election Wilkins was in theory of the law repeating his promise to pay his partner for any "rig" which he might use, and this was followed by an undoubted actual payment. In the view which I have taken, it seems to me immaterial that the payment was in fact made after the election.

Nor can I enlarge the signification of the words "wilful offence," so as to hold Wilkins guiltless by reason of an alleged ignorance or mistake of law.

There were circumstances pregnant with suspicion which it is unnecessary now to discuss, viz., the alteration in the book of the date 22nd to 21st, the blotting out or blurring of entries on a preceding page, and the charging in the account of items which did not appear in the books, the last fact being suggestive of a means whereby a volunteer of "rigs" for election day might be to some extent recompensed for his generosity.

I find that a corrupt practice has been committed by George Wilkins, an agent of the respondent, without the actual knowledge or consent of the said respondent, and I therefore declare the election of the said respondent void.

The respondent must pay the petitioner the general costs of the petition, and the petitioner must pay the respondent the costs of those charges which were tried, and which were dismissed.

The trial of the petition occupied four days, and much evidence was taken.

After hearing it I was, and I still am satisfied, that the respondent was not only not personally guilty of any corrupt practice, but that he did all in his power to secure a pure and lawful conduct of his campaign, and I do not think that corrupt practices extensively prevailed during the election.

The corrupt practice of which Wilkins is by this judgment determined to have been guilty, may be regarded as being a very technical one, and I shall hereafter order him to be summoned to appear to answer therefor.

EAST ELGIN.

DOMINION ELECTION.

BEFORE STREET, J.

ST. THOMAS, *December, 27, 28, 29, 30, 31, 1887.*

MERRITT V. WILSON.

Corrupt practice—Inducing to vote by loan or gift of money—Enabling to vote—Payment of travelling expenses—R. S. C. c. 8, s. 84, sub-sec. (a).—Ib. s. 88.

When the agent of a candidate asked a voter if he intended to vote, and the voter said he did not think so, as he could not spare the money to go, but that if he went he would not vote for the opposing candidate, and the agent thereupon lent him the cost of a return ticket; and the evidence shewed that the transaction was a *bond fide* loan and not a gift, and was not made with the intention of *influencing* the vote in favour of the principal, and that the money was repaid shortly after the election without any demand made therefor.

Held, that the above did not constitute a corrupt practice under R. S. O. c. 8, s. 84, sub-sec. (a) or s. 88.

The voter had the will to go and vote, and to vote for the agent's principal, but he had not the means to enable him to do so, and these were furnished to him by the agent, but as a *bond fide* loan, not as a gift. Thus he was not induced but merely enabled to vote by a temporary loan, and no breach of the law contained in the above sections was committed.

THIS was a petition by one William Mandeville Merritt for the unseating of John Henry Wilson, who was returned as elected at the election of a member of the House of Commons for the electoral district of the East Riding of the county of Elgin, holden on February 22nd, 1887.

The petition was in the usual form, and prayed that it might be determined that the said John Henry Wilson was not duly elected, and that he was guilty of the corrupt practices and illegal acts charged in the petition as having been committed by him, or by his agent or agents, and other persons on his behalf, and with his knowledge and consent. The particulars delivered shewed 120 distinct charges. All the charges, however, except charge No. 19,

were withdrawn or dismissed at the trial, which took place at St. Thomas, on December 27th, 28th, 29th, 30th, and 31st, before Mr. Justice Street.

Charge 19, alleged that one Thaddeus Comfort, stated to be an agent of the respondent, lent one Haggarty \$1.60, to enable him to come to St. Thomas to vote.

The effect of the evidence taken on this charge sufficiently appears from the judgment.

W. R. Meredith, Q.C., and *T. W. Crothers*, for the petitioner.

Walter Cassels, Q.C., *Coyne*, and *Farley*, for the respondent.

The following cases were cited: *The Berthier Election Case*, 9 S. C. R. 119; *Cooper v. Slade*, 6 H. L. C. 746, and *The Bolton Case*, 2 O'M. & H. 138.

January 31st, 1888. STREET, J.—At the trial of this petition all the charges were withdrawn by the petitioner, or dismissed, excepting charge No. 19, which alleged a payment or offer of payment of money by Thaddeus Comfort, stated to be an agent of the respondent, to Samuel G. Haggarty, a voter, for travelling expenses and loss of time. Upon the evidence given as to this charge I found substantially the following facts: Haggarty was a voter living near Rodney in the county of Elgin, and having a vote in St. Thomas; shortly before the election he was met in the street in Rodney by Comfort, who asked him if he intended to vote at the election; he said he did not think so, giving as a reason that he could not spare the money just now to go, but that if he did go he would not vote for Ermatinger: a few days later they again met in the street in Rodney, and the same answer being given to a similar question Comfort agreed to let him have the \$1.60 which was the cost of a return ticket to St. Thomas, and this sum was handed to Haggarty before the election by one Mavis at the request of Comfort. The parties had been well known to one another before, and Comfort had

on former occasions lent sums of money to Haggarty which had been duly repaid. Both parties swore that it was understood between them from the beginning that the transaction was a loan and not a gift, and the amount advanced was repaid by Haggarty shortly after the election without any demand by Comfort, and without any suggestion to Haggarty by any one.

Upon this evidence I found that the transaction was a *bona fide* loan and not a gift: that it was not made with the intention of influencing Haggarty's vote, or of inducing him to vote for the respondent, but that Comfort believed that Haggarty would not go to St. Thomas at all on the polling day unless funds to enable him to do so were lent to him. At the request of counsel I reserved judgment upon this charge in order that they might furnish authorities, which they have since done.

The petitioner relies upon two clauses of the Dominion Election Act, R. S. C. ch. 8, the first being sub-sec. (a) of sec. 84, which provides that "Every person who, directly or indirectly, gives, lends, or agrees to give or lend, * * any money or valuable consideration to or for any voter * * in order to induce any voter to vote or refrain from voting, or corruptly does any such act on account of any such voter having voted or refrained from voting at any election," shall be guilty of bribery; and the second being sec. 88, which declares that "the payment by any candidate, or by any person on his behalf, of the travelling and other expenses of any voter, in going to or returning from any election, are unlawful acts."

The 91st section declares that, "any wilful offence" against either of these sections is a corrupt practice within the meaning of the Act.

The voter, Haggarty, had the will to go and vote, and to vote for Dr. Wilson, so far as can be gathered from the evidence, but he had not at hand the means to enable him to do so, and these means were furnished to him by Comfort. If Comfort had intended this as a gift, the case would, I think, be brought within section 88, provided

Comfort's agency were established, as a payment of the voter's travelling expenses: that section goes further than sub-section (a) of section 84, and makes the payment of travelling expenses illegal, whether the payment is or is not made with the intention of inducing the voter to vote subject perhaps to an exception established in the *Halton Case*, H. E. C. at pp. 740-1, where it seems to have been considered that the payment to the voter after the election, of travelling expenses incurred by him before the election, such payment not being made in pursuance of any agreement or understanding come to before the election, was not a corrupt practice within the meaning of sections 88 and 91; see also the *Berthier Case*, 9 S. C. R. 118-9. But I find here that the transaction was not a gift but a *bond fide* loan, which appears to have been voluntarily repaid by Haggarty to Comfort shortly after the election without any demand by the latter, and in pursuance of the understanding, which is implied upon every loan of money that it shall be repaid; and, therefore, the only section which can apply is sub-section (a) of section 84.

If the position taken by a voter is equivalent to that which would be expressed by his saying to the candidate or his agent, "I will not vote unless you lend me a sum of money," and the money is thereupon lent to him, then, in my opinion, the lending of the money would be to wilfully induce the voter to vote within the meaning of this clause. But if the position of the voter is equivalent to that which would be expressed by his saying "I am willing to vote, but cannot do so, because I have not the means of going to the polling place," and the means are thereupon loaned to him to enable him to go to the polling place, then I think he is not induced, but merely enabled to vote. I was satisfied at the trial that the latter was the position of the voter here, and therefore I think that no breach of the law was committed.

It is urged that such a distinction as I have attempted to draw opens a fresh door to the inroads of corruption,

and renders more easy the evasion of the law ; but it is to be remembered that all loans by a candidate or his agents to electors during the progress of a canvass are not declared unlawful, but only those made for certain purposes and with certain objects. Loans made at such a time must always be the subjects of close scrutiny, and be open to the suspicion of having been made with an unlawful object, but if such a scrutiny reveals nothing stronger than the suspicion which has led to it, the loan must not be presumed to have been made for an unlawful purpose.

It is not necessary, in my view of the facts, to enter into the question of Comfort's agency.

The petition is, therefore, dismissed ; but, in accordance with the request handed in to me by counsel for both parties, I make no order as to costs.

A. H. F. L.

HALDIMAND.

DOMINION ELECTION.

BEFORE ARMOUR, C. J., AND STREET, J.

TORONTO, *January 16, 1888.*

THOMAS WALSH, *Petitioner*, v. WALTER HUMPHRIES
MONTAGUE, *Respondent*.

*Service of petition—Order for substitutional service—When to be made—
Order fixing time for trial—Jurisdiction as to—Court or Judge.*

There is no power in the Court or a Judge under sec. 10 of the Dominion Controverted Elections Act, (R. S. C. ch. 9,) to make an order within the first five days after an election petition is filed allowing service of such petition in any manner other than that intended by the final part of the section.

But where under an order made within the five days a petition was directed to be served, among other modes, upon the wife of the respondent at his domicile at the village of D.

Held, that as service on the respondent "either personally, or at his domicile," was good service, within the meaning of the section no order was necessary, and the fact that the service in this case was made under an order did not make it any the less a good service.

Held, also, that an order fixing the time for the trial of the petition might be made by the three Judges of a Divisional Court, sitting together, or by any one of them sitting alone, and that it was in their discretion to dispense with notice of the application under the circumstances in this case.

Semble, a Judge making such an order need not necessarily be sitting formally in single Court.

THIS was an application to set aside an order for substitutional service, and an order fixing the day for the trial of the petition herein, upon the several grounds set out in the judgment of Street, J.

The order for substitutional service was made on the same day that the petition was filed, and without any effort to serve the latter having been shown, on the ground that the respondent was out of the Province and was not expected to return for some time.

The motion was made on January 14th, 1888, and was argued before Armour, C. J., and Street, J.

McCarthy Q.C., and *W. M. Douglas*, for the motion.

A. B. Aylesworth, contra.

January 16, 1888. STREET, J.—This is a motion made on behalf of the respondent, the sitting member, to set aside an order, made in Chambers by the Chief Justice of this Division, permitting substitutional service of the petition, the service of the petition, the order made appointing a day for the trial, and all proceedings had under the order for substitutional service, or to the alleged service of the petition, or for an order extending the time for putting in preliminary objections and the time fixed for the trial, or staying proceedings until the next sittings of the Divisional Court in order that this motion may be made to that Court, or for such other order as to the Court may seem fit.

The grounds for the motion are (1) that there was no authority to make the order for substitutional service until after the expiration of five days from the presentation of the petition; (2) nor to make the same until some effort had been made to serve the petition upon the respondent, which had not been attempted; (3) nor to make the same until after an order had been made extending the time for service of the petition and the petitioner had been unable to serve it either upon the respondent or by leaving it at his domicile; and (4) because the order was not justified or warranted under any orders or rules of the Court; and (5) on the ground that there was no sufficient case made out, nor any case of the evasion of service of the petition by the respondent, (6) and as to the order fixing the time for the trial, because it was made without notice to the respondent, and because it was made by the Divisional Court, which had no jurisdiction to make such an order.

The election took place on the 12th November, 1887; a

recount of the ballots took place, which occupied about a fortnight; the return was published in the *Gazette* on the 10th December, and the petition was filed on the 24th December. On the same day the order in Chambers, now complained of, was made directing that service of the petition might be effected upon the respondent by serving a copy of the petition and notice of the presentation of it and of the security *upon the wife of the respondent*, or any other grown up person, a member of the respondent's family or household, *at his domicile*, in the village of Dunnville, and by similarly serving another copy of the petition and notice upon Messrs. McCarthy, Osler, Hoskin and Creelman, solicitors, &c., of the city of Toronto, and by affixing in a conspicuous place in the office of the registrar of the Queen's Bench Division of the High Court of Justice at Osgoode Hall, Toronto, a notice of the said petition having been presented, stating the petitioner, the prayer, and the fact that money has been paid into Court as security under the Act. And it was further ordered that service, when effected in accordance with the provisions of the order, should be deemed equivalent to personal service.

In accordance with this order the petition and notices were, on the 27th December, served upon the wife of the respondent, at his residence in the village of Dunnville, and the order has in other respects been complied with.

Sec. 10 of ch. 9 of the Revised Statutes of Canada provides as follows:

"Notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, within five days after the day on which the petition has been presented, or within the prescribed time, or within such longer time as the Court, or any judge thereof, under special circumstances or difficulty in effecting service, allows, be served on the respondent or respondents. If service cannot be effected on the respondent or respondents, either personally or at his or their domicile, within the time granted by the Court or Judge, then it

may be effected upon such other person, or in such other manner as the Court or Judge, on the application of the petitioner, directs."

This section is obscurely expressed in some respects, but a close examination reveals its meaning. If the petitioner is unable to serve the respondent in the manner intended by the section within the period of five days after the petition has been presented, he may apply to the Court or a Judge to have a further period allowed for the purpose. Having exhausted that period, and upon shewing that he has been unable during it to effect service in the manner intended by the section, he may then apply to the Court or a Judge for an order allowing him to effect service in some other manner. The result of this is that an order, made within the first five days after the petition has been presented, allowing the petitioner to effect service in any manner other than that intended by the first part of the section, is beyond the power of the Court or a Judge, so far as this section is concerned.

Then it becomes necessary to consider what is the manner of service intended by the section in the absence of any order allowing service in some other manner.

The section says in effect that the petition and notice shall be served upon the respondent within the five days, or within such further time as may be allowed by the Court, or a Judge. No distinction is indicated here between the manner in which service is to be effected during the first five days and that in which it is to be effected during the extended time. Then if the petitioner, having exhausted the extended time, comes to the Court or a Judge for leave to serve the petition and notice in some other manner, he has to shew that service cannot be effected on the respondent *either personally or at his domicile*, and his application should be refused, unless he shows that he has been unable to serve the defendant, either personally or at his domicile, up to the end of the extended time. The only logical result of the language of the section, then, seems to be, that service upon the respondent, either personally or

at his domicile, at any time, either within the first five days after the petition has been presented or within the further time (if any) granted by the Court or a Judge, is good service within the meaning of the section.

It was argued by counsel for the respondent that the words "personally or at his domicile" mean "personally at his domicile, or personally in some place other than his domicile;" but the section does not say this, and I do not think it means it. If that were its meaning the word "personally," without anything further, would have been sufficient; so that in order to give some meaning to those words in the section indicating an alternative method of service, which is not to be personal service upon the respondent, but is to be effectual if made at his domicile, I am driven to the conclusion that delivery to some other person at the respondents domicile is the alternative method intended.

The order attacked by the motion directed amongst other modes of bringing the petition to the notice of the respondent, that it should be served upon his wife at his domicile in Dunnville, and this was done within five days from the date at which the petition was presented. If I am right in my construction of the section, no order was necessary, and service upon the wife at the domicile of the respondent within the five days was good service upon him without any order.

The 11th section of The Dominion Controverted Elections Act enacts as follows:

"An election petition under this Act, and notice of the date of the presentation thereof, and a copy of the deposit receipt shall be served, as nearly as possible, in the manner in which a writ of summons is served in civil matters, *or in such other manner as is prescribed.*"

By the interpretation clause of the Act the expression "prescribed" means "prescribed by this Act or by the rules of Court made under this Act."

The rules of Court originally made under the Act of which the Dominion Controverted Act is a revision, pre-

scribed (Rule No. 14) that in all cases where the respondent had not named an agent, or given an address, as he might do under Rule No. 10, service should be personal upon him, unless otherwise ordered by a Judge, and by Rule No. 15, that in case of evasion of service, the affixing in a conspicuous place, in the office of the clerk of the Court, a notice of the petition having been presented, stating the petitioner, the prayer, and the fact that money had been paid into Court as security under the Act, should be deemed equivalent to personal service, if so ordered by a Judge. But the rule which required personal service was abrogated in the year 1881, so that the only manner of service now prescribed, where the respondent has not named an agent, or given an address, is that prescribed by the 10th section of the Act. The rule providing for the case of an evasion of service was, I think, intended to be read along with that which originally preceded it, and should perhaps have been abrogated at the same time with the other, or at all events, confined in its operation to cases in which the time for serving the petition shall have been extended by the Court or a Judge.

It appears to be unnecessary, in the view I have taken of the 10th and 11th sections, to consider the question as to whether the absence of the respondent should be considered for the purposes of the proceedings to have been an evasion of service.

The next object of the motion is to set aside the order fixing a day for the trial of the issues joined upon the petition, and the grounds upon which this is asked are: (1st) that no notice was given to the respondent of the application, and (2nd) that the order was made by the Divisional Court, and not by the High Court of Justice, or by a single Judge.

The 13th section, dealing with the fixing of the time for the trial of the petition, directs that at any time, after the expiration of the time for presenting preliminary objections, if none are presented, *the Court* may, "upon the application of either party, fix some convenient time and place for the trial of the petition."

By the interpretation clause the expression "the Court, when dealing with elections in the Province of Ontario, means the Court of Appeal for Ontario, or the High Court of Justice for Ontario, or any Judges thereof, and "each of the said Courts respectively, shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority, with reference to an election petition and the proceedings thereon, as if such petition were an ordinary cause within its jurisdiction."

By rule of Court No. 23, it is provided that "The time and place of the trial of each election petition shall be fixed by the Court, and notice thereof shall be given in writing by the clerk of the Court, by affixing the same in some conspicuous place in his office, sending one copy by the post to the address given by the petitioner, another to the address given by the respondent, (if any,) and a copy by the post to the sheriff, fifteen days before the day appointed for the trial: the sheriff shall forthwith publish the same in the electoral division."

By Rule No. 52, no proceedings under the Act shall be defeated by any formal objection.

The application to fix a time and place for the trial of this petition was made on the 3rd January, 1888, to the three Judges of the Queen's Bench Division, who were sitting to hear the argument of a case which had been fixed for that day, and the order is drawn up as a Court order. The material upon which the order was made was the election petition and the order of the Chief Justice as to the service thereof, the affidavits of service of the petition order and notices, an affidavit of the solicitor for the petitioner of search made in the proper office, and that no preliminary objections, or any further proceedings upon the petition, and no answer had been filed, and an affidavit of Charles Wesley Colter, the defeated candidate, stating his belief that it was of the utmost importance, in the public interest, that a speedy trial of the petition should be had, and that the charges made therein should be proved or disproved at once, and before another session of

the House of Commons should take place. *The Canada Gazette* at that time contained a notice calling Parliament together for the dispatch of business on the 31st January. It was stated by counsel for the applicant, and his statement has since been verified by affidavit, that the solicitors, upon whom the petition had been served in pursuance of the order for substitutional service, had repudiated all connection with the petition.

I think the three Judges sitting together, or any one of them sitting alone, might have made the order fixing the day of trial, and that it was in their discretion to dispense with notice of the application, under the circumstances. Notice of the day fixed has been given by the sheriff, and the petitioner has subpœnaed his witnesses to attend on the day so fixed. I think the objection is, under the circumstances, a formal one, and that the form in which the order has been drawn up, as an order of the Court instead of an order of the Judges composing the Court, is a matter which, if necessary, may be now corrected.

I do not think that a Judge making the order in question, should necessarily be sitting formally in single Court.

The notice of motion asks, in the alternative, for an order extending the time for putting in preliminary objections, and the time fixed for the trial, or for such other order as the Court may deem proper.

In the view I have taken of the statute, the proceedings of the petitioner have been substantially regular, and I do not find, upon the material before me, any definite grounds stated and shown upon which we could, in accordance with the usual practice upon such applications, grant an extension where such extension is a matter of indulgence and not of right.

The result will be that the motion is dismissed—the costs, excepting the costs of obtaining the order, to be costs to the petitioner in any event—the petitioner will be entitled to no costs of obtaining the order for substitutional service.

ARMOUR, C. J.—I agree in the result of my brother Street's judgment, and in the view he has taken of the statute as to the mode of service of the notice of the presentation of a petition.

In this view it is unnecessary to discuss the question whether the facts warranted the making of the order.

The service effected was a good service, and the fact that it was made under the order obtained herein did not make it the less a good service.

I am of opinion, however, that evasion of service may take place where a respondent has no domicile, within the meaning of that term, as used in the statute, and that in such case an order for substitutional service may be made immediately on presentation of the petition.

G. A. B.

EAST DURHAM.

PROVINCIAL ELECTION.

BEFORE MACLENNAN, J. A., AND FALCONBRIDGE, J.

MILLBROOK, November 27th, 1890.

Voters' lists—Irregularities in certified copy of—Right of omitted voters to vote—"Ontario Voters' Lists Act, 1889," secs. 5 and 17—"Tendered ballot"—Right to vote by—R. S. O. ch. 9, secs. 71 and 103—Scrutiny.

Any one of the three voters' lists regularly prepared, and certified to by the County Court Judge under the Voters' Lists Act, "is the proper list to be used," and in case of irregularity in, loss or destruction of, or other accident to, the other or others, may be resorted to for the purpose of the election.

Where all the requisite preliminaries in the preparation of voters' lists under the Act had been duly observed, but in one of the printed copies delivered to the County Court Judge, and certified to by him, two pages containing voters' names were accidentally omitted, and this defective copy was sent by the Judge to the clerk of the peace, who from such copy certified to the returning officer similarly defective lists, which were used at the election :—

Held, that the voters whose names were so omitted were not disfranchised :—

Held, also, that those voters so omitted, were entitled to vote by "tendered ballot," and their votes should be counted on a scrutiny.

Semble—The effect of sections 72 and 103 of the "Ontario Elections Act," is that where a person who has a right to vote is omitted from the list he may vote by tendered ballot.

THIS was a petition under the "Ontario Controverted Elections' Act," by T. B. Collins, the defeated candidate, against George Campbell, the sitting member in the Legislative Assembly of Ontario, for the electoral district of East Durham, who was declared elected after a recount. The election was held on the 29th May and 5th June, 1890. The petition alleged that copies of voters' lists delivered to the deputy returning-officers appointed to preside at polling places in polling sub-divisions four and five, of the township of Hope, in the electoral district, and used by the said deputy returning-officers, were imperfect, improper, and irregular voters' lists, and were not

true copies of the list certified by the county Judge as the proper voters' list, and that a number of names of persons who were entitled to vote at the election, and who claimed that their names ought to have been entered on the said voters' lists, were improperly omitted from the said copies, and that the said persons were entitled to mark, and did mark in favour of the petitioner, tendered ballots under the "Ontario Elections' Act," and asked for a scrutiny and claimed the seat.

The petition also alleged corrupt practices by the sitting member personally and by his agents.

The petition was tried at Millbrook, in the electoral district, on 27th November, 1890, before MACLENNAN, J. A., and FALCONBRIDGE, J.

McCarthy, Q. C., and R. Ruddy, for the petitioner.

Aylesworth, Q. C., and J. A. V. Preston, for the respondent.

It appeared that at the election the total number of votes polled for the respondent was 1,314, the petitioner obtaining 1,304.

The irregularity complained of in the voters' list, arose in this way. The list was prepared and printed in the usual way, and the three copies required by the "Ontario Voters' Lists Act, 1889," sec. 5, were duly sent to the County Court Judge. From one of the copies so sent, two pages containing sixty-five names, were, by a mistake in stitching, accidentally omitted, and the learned Judge taking it for granted that the printed copies were all alike, appended his certificate, according to the statute, to each of the three copies, and sent one to the clerk of the peace for the county. This copy happened to be the defective one. The clerk of the peace in turn furnished the returning-officer with copies certified from the list filed in his office and which were therefore similarly defective.

On the polling day, the fact that the lists were defective was known to both parties. Twenty-eight voters out of

those whose names were omitted, attended to vote, but their votes were refused by the deputy returning-officers, except by "tendered ballot," and they accordingly voted in that way.

McCarthy, having stated these facts, called evidence in support of them.

He also put in the tendered voters' lists for sub-divisions four and five, and proposed to open the tendered ballots. *Aylesworth* objected, contending that there was no provision for adding tendered votes to the poll, and also argued that under section 71, R. S. O. ch. 9, the list in question sent to the clerk of the peace being "the proper list to be used," was the only one that could be used; and that in the event of a new election, the same defective list would have to be used again, and that the omitted voters would again be disfranchised.

The evidence was admitted and the tendered ballots were examined subject to the objection.

McCarthy then urged that the tendered ballots should be added to the poll, which would give the petitioner a majority of two. He also contended that the election should not be set aside on account of those voters on the omitted pages of the list, who, having had an opportunity of doing so, had not voted, as they had virtually been parties to their own disfranchisement.

Their Lordships retired to consider the questions raised, and subsequently on returning into Court, delivered the following judgments :

MACLENNAN, J. A. :

We have now had an opportunity of consulting together upon the question which has been raised, and we are prepared to decide the question. We regret that we have not had an opportunity of putting in writing the conclusion to which we have come, because the question raised is a new one, and one of very general importance. But the stage at which the question has been raised in this case

does not admit of the judgment being postponed, and therefore we propose to state briefly the reasons for the conclusions to which we have come.

It has been well argued by the counsel on both sides, and we think there is nothing that could be advanced, which has not been advanced, to enable us to come to a sound conclusion upon the question. The facts are simply these, that the voters' list was prepared by the Clerk in accordance with the statute, and was posted in the various ways prescribed, so that every voter in the constituency, every person who claimed to have a vote, could see whether his name was upon the list. That list was prepared and printed in the usual way, and three copies which are required to be delivered to the learned judge of the county were so delivered to him. It turned out, however, that one of the printed copies which were delivered to him was erroneous; it omitted sixty-five names which were upon the list which was prepared—names to which no objection had been made, and which had a right to remain upon the certified list of voters. The learned judge certified the copies, taking it for granted, as one might reasonably do, that the printed copies were all alike; and that no objection having been made to the votes, all he had to do was to append his certificate as prescribed by the statutes, to the three copies with which he had been furnished. Of the three copies, one of them, it seems, omitted the names to which I have referred. The judge retained one, sent one to the clerk of the township, and the other to the clerk of the peace. The last one unfortunately was the one which was defective. Then the returning-officer applied to the clerk of the peace for a certified copy, from which he was required to furnish to the deputy returning-officers their lists, and in this copy sub-divisions four and five were defective, and the election came on. The question which we have to determine is, what effect that omission had upon the election; whether in the first place, the omission of their names from the lists supplied to the deputies had the effect of disfranchising those sixty-

five voters ; and if so, whether that necessarily made the whole election null and void, or whether the Legislature has provided any other means to save the election, and to save the franchise of these individuals under the circumstances. After hearing the very able arguments which have been addressed to us, we have come to the conclusion that these voters were not disfranchised ; that the lists which had been certified by the learned Judge of the county—one of which he had retained, and the other of which he had sent to the clerk of the township—were the true lists, and the list sent to the clerk of the peace was an erroneous one. We think one object the legislature had in view in providing that three copies should be prepared, was just to prevent such an accident as happened in the present case, that in case one copy—for example the one supplied to the clerk of the peace—should be lost or stolen, should fail of being delivered upon transmission, or should any other accident happen to it, the voters' list was still accessible, it was still there, a certified list. Even if two of them were lost, there would still be a third which could be resorted to for the purpose of the election, for that was doubtless the object the Legislature had in view in providing the three copies. We must keep in mind the idea the Legislature had in view, and we should not do anything in the way of defeating the object of the Legislature. The Legislature intended that there should be an election, that the electorate should know beforehand who the authorized electors were, and that a record should be kept of those persons entitled to vote, and we think we ought to put such a construction on the Act as will effectuate the object of the Legislature.

When we look at the various sections of the Act, notwithstanding the criticism applied to it by Mr. Aylesworth, we see that it is not necessary to say that the copy of the voters' list which was sent to the clerk of the peace is to govern, if it be erroneous. I think when the various sections of the Act are looked at, that will be apparent, and I may occupy a little time in referring to those

sections. [The learned Judge then referred particularly to sections 3, 5, 7, 10, 16, and 19 of the Voters' Lists Act, and drew therefrom the conclusion that the names of the sixty-five persons in question being found in two of the lists certified by the County Judge, their right to vote was not destroyed by their omission from the third list, even though that was the one sent to the clerk of the peace. He then proceeded:] Section 19 says that every such certified list "shall upon a scrutiny be final and conclusive evidence of the right of all persons named therein to vote at any election at which such list was or could have been legally used." We are here upon a scrutiny, two lists prepared and certified as the statute prescribes are produced containing the names of these sixty-five persons, and we think we are bound to hold notwithstanding their omission from another list that these persons had a right to vote.

Referring now to the Election Act, the sections which are material are sections 7, 71, 72, 103, and 206, and they must be all read together. Section 7 declares that the following persons and no others * * shall if duly entered on the list * * be entitled to vote, and section 72 says that "subject to the provisions of section 103 no person shall be admitted to vote unless his name appears on the list." Being named in the list is therefore made essential, subject to section 103 which provides for tendered ballots. Now look at that section 103 which provides, "If a person whose name is not entered on the voters' list claims that his name ought to have been so entered, and that it has been improperly omitted therefrom," then he may mark a "tendered ballot." He may vote, in other words. He may deliver a qualified vote. And if we read sections 72 and 103 together I think it is plain that the Legislature made this law so that every man whose name is found on the list may vote, and that every man who has a right to vote, even if his name is not on the list, may vote in this qualified way. He may mark a ballot indicating for whom he votes, and it may be counted upon this stage of the proceedings, viz., a scrutiny.

That I think is the effect of those two sections. It was contended that we have no right to put any vote on the list. Now we think it clear that section 103 would have no meaning, would be wholly nugatory unless we have the power to add those who have voted by tendered ballots. Section 103 would fail of its object altogether and would be utterly useless. But we are not without authority on that point. It has been determined that upon a scrutiny voters who have marked tendered ballots have the right to be added to the poll; Rogers 15th ed. 663, Leigh & LeMarchant, 173; so also in the *Lincoln Case*, H. E. C. 500, at p. 518, Mr. Justice Patterson assumed that such was the result of the enactment, that the sole object in allowing people to mark tendered ballots, was that they might be added to the poll, upon a scrutiny, if it turned out they had votes.

With regard to Mr. Aylesworth's argument upon section 71, which notes "the proper list to be used" we think we cannot put such a narrow construction upon the Act as he contends for. We think there are other parts of the Act which show that the Legislature did not intend that the copy sent to the clerk of the peace was to be the only one which might be used.

Then there is section 206, which provides that every person applying for a ballot paper under the Act, shall be deemed to tender his vote or to offer or assume to vote. It will be observed the mere application for a ballot is a tender of a vote. The returning-officer might refuse to give a voter even a tendered ballot, but if he applies for a tendered ballot, then he must be regarded as a person who has tendered his vote. "Every person applying for a ballot paper under this Act shall be deemed to tender his vote, or to offer or assume to vote; and any person shall be deemed to have voted who has put his ballot paper into the ballot box, or has caused the same to be put into the ballot box, or has delivered the same to the deputy returning-officer or poll clerk, for the purpose of having the same placed in the ballot box." The statute provides that tendered bal-

lots should be put in the ballot box, so that we think—although it may seem at first a strong construction of the section—when the voter receives a tendered ballot and marks it, and delivers it to the returning-officer, under this section he is a person who has voted; and we think all those persons who tendered their ballots in this case are persons who have voted, the distinction being that the person voting marks the ballot for the candidate of his choice; he has voted, although the returning-officer, as required, has not counted the vote. The time arrives when his vote will and can be counted, and we think that time has now arrived, that it is our duty now to declare that those persons had the right to vote, and are entitled to have their votes counted, notwithstanding that they were not upon the list delivered to the deputy returning-officer. He did his duty in refusing to let those persons vote in the ordinary way, but by means of the tendered ballot, he saved their votes until the present time to be counted.

Now section 74, of the Controverted Elections' Act, which provides for a scrutiny, refers to "the votes polled." These tendered ballots were "polled," and we find they were cast by persons entitled to vote, and we therefore think we ought to count them.

Only twenty-eight of the sixty-five omitted voters put in tendered ballots, and it is said the others were disfranchised.

That would have been a very serious difficulty, because if there were thirty-seven who had a clear right to vote, and who were disfranchised by mistake, then it would have been a very serious thing, and we could not allow the election to stand, because we do not know how those thirty-seven persons would have voted, and it was admitted by Mr. McCarthy that he could not hope to make the poll of his client so large, that if they were counted against him, he would still have a majority.

We do not think that those thirty-seven were disfranchised at all; we think the provision made for tendered ballots was intended for just such a case. The lists certified

by the county Judge, one of which he retained, and one of which he sent to the clerk of the township, are made final and conclusive as to the right of persons to vote. They bring these certified lists before us, and say their names are upon it, and the Legislature says these lists are final and conclusive as to their right to vote, therefore when they went before the deputy returning-officer, they had a right to vote, and they had a right to demand a tendered ballot paper. Every one of the thirty-seven might have gone to the poll and might have tendered his ballot for the candidate of his choice, and might have put it in so that we could now have given them the benefit of their votes for the candidate whom they preferred. Therefore these persons are not disfranchised, and we do not think that on that ground the election ought to be avoided. We do not know whether any one of the thirty-seven chose to go to the poll at all, or whether he would have gone to the poll if his name had been regularly on the list, so that on that ground we could not set aside the election. We, therefore, think that those persons who tendered their votes, are entitled to have the benefit of their ballots, and should be added to the poll of the respective candidates for whom they marked them. There is no dispute now between counsel that the number of voters which has been mentioned, are persons who really had a right to vote. Ten ballots in the first list were for Mr. Collins, and two for Mr. Campbell, and ten in the second list for the former, and six for the latter, which leaves Mr. Collins two votes in the majority.

FALCONBRIDGE, J.:—

I agree in the general result of the judgment. The only point of difference was as regarding the votes of the thirty-seven electors—less the number who are disfranchised by residing out of the riding—who were not upon that list. The question was, then, whether we would go into a scrutiny further, or avoid the election on that ground. As I

said, I have felt strongly about that, but in view of the fact that the parties are here, no doubt at enormous expense prepared to go into the scrutiny, I think it better to agree on that as well as upon the main question.

Of the tendered ballots, twenty were marked in favour of the petitioner, and eight in favour of the respondent, thus giving the petitioner a majority of two. Subsequently upon further scrutiny, the votes were brought to a tie, and no evidence having been offered of corrupt practices on either side, the election was avoided without costs.

HAMILTON.

PROVINCIAL ELECTION.

BEFORE FERGUSON AND MACMAHON, JJ.

HAMILTON, *December 11th, 12th, 13th, 15th, 16th, 17th, and 19th, 1890, and*
 TORONTO, *January 17th and 26th, 1891.*

MARK JOHNSTONE PATTERSON, *Petitioner,*

V.

THOMAS HENRY STINSON, *Respondent.*

Offer to treat—R. S. O. ch. 9, sec. 155—Valuable consideration—Sec. 151, sub-sec. (a)—Scheme to induce a class (aliens) to vote when not entitled—Knowledge under sec. 160—Statute, partly penal and partly remedial—Amendment after notice—Corrupt practice—Trifling nature—Trifling extent—Sec. 163.

Two agents of the respondent went for a voter, having a flask of brandy in their conveyance. The voter having said he was unwell was asked if he would have a drink, which the trial Judges held meant a drink from the flask, and which he declined :—

Held, that this offer did not fall within the provisions of sec. 155 R. S. O. ch. 9, as there was no "giving or causing to be given" :—

Held, also, that it did not come within sec. 151, sub-sec. (a) a drink not being a valuable consideration.

A number (300) of forms of oaths of residence and allegiance were printed and paid for by the association supporting the respondent as part of the election expenses, and some of the respondent's agents actively canvassed a number of foreigners, who were aliens ; and by getting them to swear to these affidavits, and by conversations induced them to believe that they were thus naturalized, and had the right to vote, and several of them did vote. The evidence did not shew how many were sworn, but 235 unused forms were produced, and the remaining sixty-five were not accounted for :—

Held, that the procuring of these affidavits just before the polling day when the agents knew that no Court would sit in time to complete the naturalization proceedings by that day, was a plan, design, or scheme to induce the aliens to vote for the respondent: that the knowledge, referred to in sec. 160 R. S. O. ch. 9, is not a knowledge of the statute, but a knowledge of the facts disentitling the person to vote: that although that section contains a penalty of \$100, still it is partly penal and

partly remedial : that in enforcing the penalty, the person against whom it is inflicted is the only person concerned, and it should be strictly construed ; but in ascertaining whether a corrupt practice has been committed the whole constituency has concern, and only the remedial part of the section is invoked : that on the evidence an agent had the knowledge that one of the aliens had no right to vote at the time he induced him to vote.

Before the trial notice was given that if the evidence failed to shew that the money received by the persons named in charge No. 8 for the purpose of influencing voters as therein stated, an application for an amendment would be made substituting a charge under sections No. 11 and 13 of the petition, that those persons were paid for their services, and so were guilty of corrupt practices in voting for the respondent, knowing that they had no right to vote :—

Held, that two agents of the respondent who were paid for their services, knowing the facts and being presumed to have known the law, were each guilty of a corrupt practice when they voted for him ; and that the amendment as to them should be allowed, as it was really giving particulars under paragraph 13 of the petition, and could be made without any amendment of the petition, and that the evidence sustained it, and as notice had been given the respondent was not prejudiced :—

Held, also, that the acts of the two paid agents in voting, had they stood alone, not being part of any comprehensive scheme, the Court would have hesitated before deciding that they did not fall within section 163, in which case the election would not have been avoided : but following the *East Simcoe Case*, 1 E. C. 291, that the inducing the aliens to vote was an overt act, part of an arranged system of operations, and was such a corrupt practice as could not be considered of “such trifling nature,” or “such trifling extent,” that the result could not be supposed to be affected by it.

Had the corrupt practice indicated not been sufficient of itself to avoid the election, the two other corrupt practices proved, together with certain other illegal practices committed by a person not an agent of the respondent, the evidence as to which was uncontradicted, would have sufficed.

THIS was a petition filed by Mark Johnstone Patterson, an elector of the electoral division of the city of Hamilton, who voted at the election against Thomas Henry Stinson, the successful candidate, who had been elected by a majority of eighty-six votes in a total of eight thousand and seventy-six votes polled.

The petition contained the usual charges against the respondent and his agents of bribery, treating, paying travelling expenses, and also the procuring of a number of aliens to vote, who had made the affidavits of residence and allegiance only, without the subsequent court procedure necessary to perfect their naturalization ; it also alleged a payment to a captain of the Salvation Army, and to a citizens' band.

Osler, Q. C., and *Teezel*, Q. C., appeared for the petitioner. *Meredith*, Q. C., *Nesbitt*, Q. C., and *Bicknell*, appeared for the respondent.

After hearing the evidence and addresses of counsel judgment was reserved.

January 17, 1891. FERGUSON, J.:—

There was a very large number of charges contained in the particulars delivered pursuant to orders made therefor. Some of these were abandoned by the petitioner, and many others were disposed of at the trial. Counsel have been good enough to prepare for us a paper containing a statement of the charges that were neither abandoned nor so disposed of as being those in respect of which judgment has to be given; and no doubt is entertained that this statement is in all respects accurate.

It will, I think, be convenient to consider the charges in the order in which they appear in it, or substantially so. The charges are numbered in the margin of this statement, and these numbers indicate and correspond with the numbers of the same charges respectively in the particulars filed and delivered as aforesaid.

[The learned Judge first considered an alleged payment by the respondent of a sum of \$10 to one Dent, and came to the conclusion upon the evidence that the charge was disproved.

There were certain charges called the "Collier charges," the evidence in support of which was given by a Colonel Collier; and it was admitted by the respondent's counsel that if the alleged agency of Colonel Collier were proved, some of the acts shewn would be corrupt practices, which would have the effect of avoiding the election. It appeared that this witness had two objects in view in taking part in the election; one to win money by bets he had made on the respondent; and the other to satisfy a grudge he had against the other candidate. The learned judge having considered the evidence bearing on the question of

the agency of Colonel Collier came to the conclusion that he was not constituted an agent, and was not an agent of the respondent, and he dismissed these charges.

Other charges of treating and buying refreshments and hiring conveyances were also dismissed, and the learned Judge then continued]:

The next in order is charge thirty-five. It reads "that on the 5th day of June, 1890, W. H. Cornwall and Hugh Gawley, of Hamilton, labourers, agents for the respondent, offered John Fanning, of Hamilton, labourer, \$1.50, and also a drink of liquor at his residence, Hamilton, to induce the said Fanning to vote for the respondent."

The consideration of this is now confined to the offer of the liquor: the finding at the trial having been that the offer of the money had not been made. As to the offer of the liquor, Cornwall and Gawley went for the voter Fanning. Gawley had with him in the buggy or rig, as it was called, a half-pint flask of brandy. During the conversation with Fanning respecting his going to vote or not, Fanning said, amongst many other things, that he was not well, and Gawley asked him if he would have a drink meaning, no doubt, a drink from this small flask of brandy.

This, I think, does not fall under the provisions of section 155 of the Act, R. S. O. ch. 9. There was no giving or causing to be given. There was only an offer made under the circumstances before stated.

The contention was that the case falls under the provisions of section 151, sub-sec. (a), the offered drink being a valuable consideration within the meaning of those words in that sub-section. Counsel, in this contention, sought to compare the case with one in which a barrel of liquor was offered instead of a drink, urging that the difference would be only one of degree. I do not perceive the force of this argument. A barrel or other large quantity of liquor would be, or might be, a thing of value out of which money could be made or saved as a matter of business or otherwise. Not so with the drink only, which is to be taken immediately. I do not see how the one must be a

valuable consideration because the other might be. But apart from any consideration of this sort, it appears to me that one part of the Act professes to deal with, amongst other things, drink, and does not go further than "giving or causing to be given," and does not include an offer to give. The other part deals with corrupt practices, and other illegal acts, and gives certain definitions of bribery. I cannot bring myself to think its provisions comprehend this sort of a case at all; or that the offer of a drink, such as made here and rejected, was the offer of a valuable consideration, within the meaning of the sub-section (a).

I am, therefore, of the opinion that what remains of this charge should be dismissed.

The next charge in order, is number 113. It is this: "The respondent, Francis Fitzgerald, his election agents, William Goering, Rudolph Rissman, and the members of the management and executive committee, * * all of whom were agents of the respondent, devised and adopted a scheme to procure and induce a large number of aliens, resident in Hamilton, to poll their votes * * for the respondent, and in pursuance of said scheme, the respondent and said agents led the said aliens to believe that they became qualified to vote by taking an affidavit of residence and allegiance only, without the formal proceedings in open court, as required by law, and that in further pursuance thereof, the said Fitzgerald and Goering prepared, or caused to be prepared, and sworn a large number of such affidavits by said aliens, from time to time, between May 1st, and June 5th 1890, * * and thereby induced and procured the said aliens to vote for the respondent. And among the said aliens who were so induced to vote, are the following; all of whom reside in Hamilton—namely, Jacob Brownstein, William Lenz, William Beckman, John Hackbush, J. Peaser and Herman Prellips."

It does not appear that the matters referred to in this charge, were the subject of any discussion, or any resolution at any meeting of the association or any of the committees.

Fitzgerald, the respondent's election agent, says he knows something of the alien votes; that the form of oath for an alien was prepared by some one in his office before the election, and was "printed off;" that he does not know of any one having charge of the alien vote; that he does not know where the affidavits are—meaning, as I take it, the affidavits that were sworn to—that the last he saw of them they were lying loose in the pigeon holes; that the affidavit is a step towards naturalization; that there were not more than twenty of these affidavits; that a few of them were sworn to before him—as a notary public, I fancy—that the intention was to get them (the aliens) qualified to vote; that the oaths taken before him were taken at the "head quarters;" that he cannot say how many such blank affidavits he got or were printed off.

The account for printing produced at the trial, contains an item, 300 forms "alien." The sum or footing of this account is \$310.50. This sum appears as the first item in the detailed statement of election expenses, under the words "The Spectator Printing Co. for printing and advertising." The amount of this detailed statement being \$970.36, has, as I understand, been paid according to the items or charges contained in it. These payments were made, as I understand, by the proper officers in that behalf of the association. This item for the printing of these 300 blank forms of affidavits for aliens, a small one, only \$4.50, it then appears, was paid by the association, as an item of election expenses.

Further on, Mr. Fitzgerald says: The instructions for canvassing aliens, may be in the box. (This was a box spoken of, but not then in court.) He afterwards says that he does not know that there was anything in the instructions with reference to aliens. This box was afterwards produced and contained nothing of consequence. He says the blank affidavits for the aliens were at head quarters; and that he does not know of any one working at these excepting William Goering, and repeats that the form was, he thinks, drafted in his own office.

Mr. Fitzgerald was at the time of the election the secretary of the association, and had been such secretary for about fifteen months prior thereto. He says that after the affidavits had been sworn to by the aliens, no further step was taken towards naturalization so far as he knew.

Two hundred and thirty-five blank affidavits were produced, showing that this number of the 300 that had been printed, had not been used. One of these was filed and marked as Exhibit J. Those that had been filled up and used, were not produced. In most of the instances appearing in the evidence, if not in all, the affidavit after being sworn was not kept by the deponent, but by the person who was the actor in preparing it and having it sworn. Some were left at the headquarters, where they had been sworn to.

No charge was made for preparing the affidavits for these aliens. Fitzgerald says the printing of the affidavits was paid for by the association. He could not give any of the names of the persons sworn before himself. He says he swore eight or ten, and left the oaths in the custody of William Goering, he thinks, at the association rooms.

William Goering says he was a voter and voted at the election ; that he was paid \$75 for services rendered in the election ; that he had charge of the committee-rooms and looked after the returns of the canvassers ; that the canvassers made their returns to him, though he did not receive their books from them ; that the books were given to them by Fitzgerald ; that the vice-president of each ward, handed in the books, which were for the time being put into a box, but they were not kept. He says that some, and perhaps all the books, were eventually kept by the canvassers, and that he does not know where they are. He says the canvassers "returned" to the vice-presidents and they "returned" to him.

He says that some of the aliens for whom he prepared affidavits were upon the voters' list. He says he did some canvassing among the German people, that if any of them wanted to be naturalized, he would make out the papers for

them ; that he naturally thought that what they wanted to make the affidavit for was so as to be able to vote ; and that if he thought any one of them was intending to vote the "opposite way" he would endeavour to win him over. He says that he "naturalized" Hackbush and Beckman, and perhaps others whose names appeared upon the list of names read to him ; that he thought Mr. H., a barrister, went with him to get a certain paper (produced) which counsel was pleased to call an "invoice of aliens." Mr. Goering further says that he heard there were some Germans at the mills who desired to be naturalized, and he went to see them ; that many of them were very anxious ; that there were not so many as twenty of them, and that he found that some of these had been naturalized the previous year. He also says that he had had some experience in preparing naturalization papers, for he had drawn such papers more or less for ten or twelve years. He says he went with one Mr. B. to see some people who he heard wanted to be naturalized, and that when any took the oath he took away the papers. He says he understood that the swearing to the affidavit had the effect of naturalization, and that he did not learn the contrary of this till after the election ; that he thought this was all that was necessary to entitle the persons to vote, and that he did not read the endorsements on the papers—the affidavits—(one would think this rather strange ignorance after the experience this witness says he had had).

Mr. Fitzgerald, on his cross-examination said, that the duties of William Goering were clerical only, but we have the testimony of Mr. Goering himself, as to what or as to many things he did, and there can, I think, be no reasonable doubt that his acts of canvassing, etc., were adopted and accepted, and I think there should be no hesitancy in saying that he was an agent by whose conduct the respondent was bound, or might be affected.

Mr. Fitzgerald says that Thomas Loney was on the committee and belonged to polling division number nine. The detailed statement of election expenses shows that he

was paid \$45 as wages for five weeks as caretaker of the headquarters of the association. He voted.

Mr. Fitzgerald also says that William K. Foster was at headquarters; that he worked in preparing canvassing books; that since the election the association paid him \$25; that he was not promised anything for his work. He says that this sum was advanced by Mr. Evans, and afterwards brought before the association. It was, however, subsequently shewn, I think, that this matter has not yet been brought before the association: the witness expressing the opinion that when it is brought before the association it will be ratified and adopted. Foster also voted.

1. John Hackbush says he has been eight years in this country; that he was born in Germany; that he never had a certificate of naturalization; that his parents were German; that he knew Goering and Fitzgerald; that he saw Fitzgerald at the conservative hall; that he went there to see if his name was on the list; that this was about two weeks before the election; that some of his friends had told him that he had a right to vote; that he asked Goering for his naturalization papers; that Goering drew up a paper and he signed it; that he signed but one paper; that he told Goering where he was born, how old he was, and where he was living; that he swore to the paper before Mr. Fitzgerald; that Fitzgerald kept the paper; that nothing more was said then about the election; that Goering told him to call for the paper; that he called in about a week or so after; that Goering then said the papers were not done and had to go through the Court; that he did not go again before the election day; that he got cards, but no one asked him to vote; that he thought he had a right to vote; that his friends told him so, though he says in a general way, "They told me I could not vote without a certificate." He says that Goering said he would send him the papers before election day; that he really wanted to become naturalized; that he had voted at a previous election, and that he was not sworn when he voted at this election.

2. Jacob Brownstein says he was born in Roumania; that his parents were born there; that he voted at the election; that he had no certificate of naturalization; that he took an affidavit about four days before the election; that he was at headquarters; that nobody took him there; that Fitzgerald was not there; that he told Goering that he wanted him to make out his papers; that Mr. Gibson, after having asked him several questions, said he had as good a right to vote as any one, and asked him to vote for him; that he was at headquarters only the one time; that Goering drew the papers for him; that he had been six years in the country, and he wanted his papers; that he told Goering nothing but that he wanted his papers; that he did not pay anything for having the papers made out, and that Goering told him he would get his papers some time.

3. Herman Prellips says that he worked in the rolling mills; that he had been eight years in Canada; that he was born in Germany; that he voted; that he had not obtained his naturalization papers; that he made an affidavit in the office at the rolling mills; that Goering was there and another man who was lame; that he and Goering brought the papers for him to swear; that he had not sent for them, nor did he know they were coming; that Goering wrote the affidavit, and asked him to swear to it; that Goering asked, and he told him where he was born, and how long he had been in this country; that the reason for making the affidavit was so that he could vote; that "all around" were talking about voting; that he had seen his name on the voters' list; that nothing was said about voting when he made the affidavit; that John Peaser's affidavit was taken at the same time; that both Gibson and Stinson had asked him about voting, and he had told each that he would vote for him; that he paid nothing for drawing the paper, and that he once asked Goering for it, but this was after he had voted.

4. William Lenz says he voted; that he and his parents were born in Germany; that he came to America two years

ago; that he has not his papers of citizenship; that he swore to an affidavit for the papers; that he did this in Hamilton the same day that he voted; that some one made out the paper; that he does not know who; that he does not know Goering; that he does not know who asked him; that he works at the rolling mills; that he made the affidavit at the rolling mills; that four men came there; that he did not know any of them; that he does not know Prellips; that his brother, who has since gone to Germany, swore at the same time; that some body asked him to vote but he does not know who; that he cannot say whether the same men asked him to vote who made out the affidavits; that he was not one of the four who came; that the four only came once, and that they took him away as soon as he had signed the paper; he did not know the reason; that they took him to vote; that only one of the men who took him away could speak German; that the man who drew the paper could speak German; that he told him how long he had been in Canada; that he does not know what became of the paper, but he did not get it.

5. William Beckman says that he voted, that he was born in Germany of German parents; that he was nine years in Canada; that he had no certificate of naturalization; that Goering told him he would send his papers to him but he has not got them; that Goering was at the mill and took down the names of all the Germans; that this was a couple of days before the election; that Goering told him that the gentleman who was with him was a lawyer; that they put down his name and asked him to swear and he swore; that they asked him to vote for Stinson, that Goering asked him to do this. He says that Peasor, his brother John Beckman, and Prellips were there and swore also; that Goering put his paper into his pocket and he has not seen it since; that he did not pay anything for drawing the papers; that he did not know Goering was coming before he came; that nobody had asked him for his vote before that day. He says he told Goering the same as he was telling in Court, that is as to

his place of birth etc., and the time he had been in this country.

In cross-examination he says he did not see anybody sign that day but himself; that the others told him they had signed; that nobody was present when he signed but Goering and the lawyer, and that he did not know either one candidate or the other. He says that a cab came for him to vote; that Rudolph Rissman came with the cab.

6. William Peasor says he is a German; that his parents are German; that he has been over ten years in Canada; that seven or eight days before the polling day he swore to an affidavit; that he voted; that a man at the rolling mills got him to swear; that this man was Goering; that another man was with him; that one of the two gave him the books; that Goering asked him if he had a vote and he said "yes," but that he did not ask him to vote for Stinson; that Goering said he would send the paper back in fourteen days; that no one had asked him to vote before Goering came, nor on polling days; that it was a young man who came for him and took him and Prellips in a buggy; that no one asked him for his vote; that he did not know who Goering was working for; that Mr. Gibson was one day at the mill and asked every man to vote for him; that afterwards Mr. Stinson came and asked every man to vote for him; that he promised both; that Goering was there before Stinson; but he does not know whether before or after Gibson, and that Prellips and he were together at the swearing.

Such is the evidence of these six men, respectively. I think it appears by the evidence in support of this charge that there was a plan, design, or scheme to induce or procure aliens to poll their votes at this election for the respondent. The procuring of the blank affidavits and forms, the 28th or 30th of May, it being the fact that there was to be in the regular order of things no court at which the completion of naturalization could take place then before the day of the polling; this being known to

the actors, the use that was made of some, a large number of such forms, and what was done in respect to the matter as appearing by the evidence already referred to, leave I think, no room for a reasonable doubt as to the existence of such a scheme or design; yet, I find difficulty in saying that it is proved that any were parties to it or implicated in it but Fitzgerald and Goering. It is true that the organization paid for the printing of the forms the \$4.50, a small item embodied in a large account, as before stated. This may be consistent with entire innocence, and I do not think that standing alone, it is sufficient to show that the organization was a party to this scheme or design. In considering this, I have not left out of mind the fact that Fitzgerald was the secretary of the organization. An officer or servant of an organization may, I take it, be guilty of a wrong which will not affect the organization unless the organization, with knowledge, adopt the act in some way, or seek to have the benefit of it; and here I think the evidence falls short of what is required in this respect.

I think it is shown that in pursuance of this scheme or design, Fitzgerald and Goering prepared, or caused to be prepared and sworn by aliens a large number of affidavits of allegiance and residence, from time to time, during the latter part of May and up to the 5th day of June, 1890.

I also think it is shown that Fitzgerald and Goering led aliens to believe that by taking such oath of allegiance and residence, they would be entitled to vote; and that in doing this, Fitzgerald and Goering made use of these affidavits in the form in which they were; and that by these means aliens were by the said Fitzgerald and Goering induced and procured to vote at the election, and that in doing this, Fitzgerald and Goering had knowledge of the facts. They are presumed to have known the law.

The section of the English Act, corresponding, or corresponding in part with section 160 of our Act, is the first sub-section of section 9 of the "Corrupt and Illegal Practices Prevention Act," as it is sometimes called, 46 & 47

Vict. ch. 51 (1883), which is: "If any person votes or induces or procures any person to vote at any election, knowing that he or such person is prohibited, whether by this or any other Act from voting at such election, he shall be guilty of an illegal practice."

At the trial there was some little discussion as to a difference there might be as to not being entitled at common law to vote, and being prohibited by statute from voting. This, I think, not of importance, because I think aliens are, by our statute, prohibited from voting. See section 7 of the Act, and section three of the Act known as "The Manhood Suffrage Act."

In Mattinson and Macaskie's work on "Corrupt Practices" at Elections, 2nd ed. p. 82, referring to the section of the English Act above set forth, the authors say: "The knowledge referred to must be, not a knowledge of the statute which creates the disability, because every person is supposed to know the law, but a knowledge of the *facts* in relation to the person's status or past conduct which bring him within the statute." This, so far as I am able to perceive, is a correct view. In the case, *The County of Norfolk (Northern Division)*, 21 L. T. N. S. 264, Lord Blackburn seems to have assumed without proof that the agents were aware of the statute there under consideration.

Our section 160 continues, however, "and shall be liable to a penalty of \$100." This is not in the section of the English Act. It might be contended that for this reason the section in our Act is penal and should receive a strict and literal construction, not only in the point of defining and "setting down" the offence but also in prescribing the punishment, and that no man incurs a penalty unless the act which subjects him to it is clearly within the spirit and the letter of the statute imposing such penalty, and that, therefore, the knowledge meant in our section 160 comprehends knowledge in point of fact of the existence of the statutes and the law, and the meaning of the same.

Even if it be assumed that this contention would prevail in an action or other proceeding to recover or enforce the

penalty—as to which I need not offer any opinion—yet I think it cannot prevail here. A *penal* statute may also be a *remedial* law, and a statute may be penal in one part and remedial in another part: Potter's Dwaris, 75; *Wynne v. Middleton*, 1 Wilson 125.

The same or a similar idea seems to have been in the mind of one of the learned judges of the Court of Appeal in the case *Huntington v. Attrill*, 18 A. R. 136, the judgment in which has been so recently delivered where Mr. Justice Osler says: "If we speak merely of the ordinary distinction between laws as being *penal* or *remedial* the act in question in its effect upon the defendant may be regarded in that sense as a penal law, but from the creditors' point of view it is remedial, intended to give them a civil remedy for the recovery of their debts," thus disclosing the view that the same statute may be regarded as penal or remedial; this depending, sometimes at least, upon what is sought to be enforced or done under its provisions.

I think this section 160 is both remedial and penal, that it has a remedial part and a penal part.

The restraining or strict construction of the general words of a penal statute are for the benefit of him against whom the penalty is inflicted: Potter's Dwaris, 245. In enforcing the penalty imposed by this section the person against whom it is inflicted is the only one who has concern. In ascertaining whether or not a person has induced or procured another person to vote, knowing that such other person had no right to vote, or whether or not a person has voted knowing that he himself had no right to vote for the purpose of discovering whether or not a "corrupt practice" has been committed, which, if done by the candidate or his authorized agent would avoid the election, the whole constituency at least has concern and is interested, for the matter reaches objectively to the purity of Parliament. In making or seeking to make this discovery only the remedial part of this section is, I think, invoked. The section in this view, only defines a certain kind of "corrupt practices," and should receive, I think, an ordinary and not any strict or

restrained construction. For these reasons, and being of the opinion that it is right, I have adopted the view before referred to stated in Mattinson and Macaskie's work, according to which the requirements of the word "knowing" employed in the section are satisfied by the legally presumed knowledge.

There is, moreover, the direct and positive evidence of Hackbush, a witness whose testimony seemed worthy of entire credence, that Goering told him his papers were not done, that they would have to go through the Court and that he would send Hackbush his papers before election day, indicating, as I think, that Goering knew what the law was on the immediate subject.

There were in the office where Goering was working certain election papers in which was the information both in regard to the subject of aliens not having the right to vote and also as to the prohibition or disqualification under the provisions of section 5 of the Act, see particularly "Hints and Instructions to Canvassers," Exhibit C. (a) And although Goering now says that he had not at the time such actual knowledge I cannot but be of the opinion that a jury might reasonably find upon the evidence that Goering did possess such actual knowledge at the time of his inducing or procuring Beckman to vote.

The respondent's election agent, Fitzgerald, and Goering were working in the same rooms and were I think operating in conjunction pursuant to their scheme or plan in regard to what was called the "alien vote," Goering being (as far as appears) under Fitzgerald.

Take the case of William Beckman. A couple of days

(a) Those portions of exhibit C which are material are
"Hints and Instructions to Canvassers."

1. Who are entitled to vote.

* * * * *

2. A subject of *Her Majesty* by birth or naturalization.

* * * * *

3. No one is entitled to vote who has received anything or who has been promised anything directly or indirectly, either to induce him to vote or refrain from voting, or for loss of time, travelling expenses, hire of team, or any other service connected therewith.

before the polling day Goering went to him at the mill having with him another man who he took the trouble of telling Beckman was a lawyer. They took down the names of all the Germans there. They took Beckman's name and asked him to swear, which he did, and for this purpose there can be no doubt that one of those blank forms was used. Goering promised to send Beckman the papers, but Beckman did not get them.

It is plain that some of these people, aliens, imbibed and had the idea that although some further papers were necessary to complete naturalization, yet that when one took the oath of allegiance and residence he became entitled to vote. On this occasion when Beckman had taken the oath at the solicitation of Goering and his lawyer friend, Goering asked him to vote for Stinson. This was, I think, the equivalent of saying, "Now you have taken the oath and in consequence of this you have a vote and I ask you to vote for Stinson." I think this was a procuring or an inducing of Beckman to vote, for Beckman was afterwards sent for and did vote : and I think the obtaining and use of these blank forms was a substantial part of the scheme and design by which this was brought about. I think it is proved that Goering induced or procured Beckman to vote at the election knowing that Beckman had no right to vote at the election within the meaning of section 160 of the Election Act. This specific charge does not however appear amongst the allegations of the charge in question.

In respect to Beckman I am of the opinion that this charge 113 is substantially and clearly proved, the scheme or design being confined to Fitzgerald and Goering, both of whom were agents for the respondent.

As to the other five, the evidence does not clearly show the inducing or procuring ; but what does appear tends, I think, strongly to support the assertions of the petitioner as to the existence and purpose of the scheme or design.

The one case is, I think, clearly made out in all respects : for an inducing or procuring a man to vote may, according to the definitions and meanings of these words, be no more

than soliciting a man to vote in a case where the man does actually vote.

The next following two charges in the statement are numbers 163¹ and 180². I do not think either of these proved, and I am of the opinion that they and each of them should be dismissed.

At or near the close of the trial an application was made on behalf of the petitioner for leave to amend his particulars. This was pursuant to notice thereof given on the 8th day of December. The amendment asked was, that if upon the trial it should appear from an examination of the respondent, or members of the management, or finance committee of the Hamilton Conservative Association, or upon the evidence of Francis Fitzgerald and the other persons named in charge 8 of the particulars served on the 25th of November, that the persons named in said charge 8 as having received money, etc., received the said moneys not for the purposes and with the intent mentioned in the said charge number 8; but received moneys, or expected to receive moneys from the respondent, or from the management or finance committee, or other persons, officers of the Hamilton Conservative Association, as remuneration for the services or loss of time of the said—then follow a large number of names, amongst which are the names, Thomas Loney, William Goering and Thomas K. Foster—then and in that event the petitioner would apply to strike out said charge (number 8) from the particulars, and to substitute a charge under paragraphs 11 and 13 of the petition, stating that the respondent Francis Fitzgerald, his election agent, Robert Evans, acting treasurer, and the members of the Hamilton Conservative Association who were agents for the respondent between the first day of May and the fifth day of June, 1890, promised or paid to——. —then follows the same large number of names, amongst which are the same Thomas Loney, William Goering and Thomas K. Foster—

¹ Furnishing beer.—REP.

² Giving drivers of conveyances money to treat voters.—REP.

all of whom were active canvassers and agents for the respondent—large sums of money as remuneration for their respective services and loss of time as agents or canvassers for the respondent, for the purpose of forwarding the respondent's election; and that they, the persons therein above named—including the said Loney, Goering, and Foster, were guilty of the corrupt practice of voting for the respondent, knowing that they had no right to vote at the said election, by reason of receiving money from the respondent and his agents, or expecting to receive money from them, or some of them, as remuneration for their respective services in forwarding the said election.

Charge 8, for which this is sought to be substituted, was under paragraph 3 of the petition, and is, that the respondent, either personally or by the management or finance committee of the Hamilton Conservative Association, who were agents, etc., gave and provided these persons with large sums of money, with the knowledge and intention that they should and would apply the said money for the purpose of corruptly influencing voters in Hamilton to vote for the respondent, and to induce them to procure the return of the respondent; and that these persons did use the said moneys for the said purposes. And that the respondent and the said committee paid, or caused to be paid to the said persons large sums of money in repayment of moneys expended by them in bribery and treating at said election.

Of this eighth charge now sought to be substituted by another charge, there was confessedly no proof.

Thomas Loney was paid for five weeks services the sum of \$45. William Goering, who was a clerk, was paid \$75 for services. These are admitted; and it is also admitted that both Loney and Goering voted. Thomas K. Foster was working on the understanding that he was to get nothing for his services; but afterwards on the 28th of June, he got from Mr. Evans, the acting treasurer, \$25, giving Evans his due bill for it, and Evans was to lay the matter before the association for its approval, which he has not yet done. Foster also voted.

The contention under this amendment, if allowed, will be that these three persons were, under the provisions of section 5 of the Act, not entitled to vote; that they nevertheless voted knowing they had no right to vote in violation of section 160 of the Act; that by this section, and also by sub-section 6 of section 2 of the Controverted Elections' Act, this is declared a corrupt practice; and that these persons were agents of the respondent.

The 13th paragraph of the petition charges corrupt practices. The proposed amendment is really particulars of alleged corrupt practices, and would naturally be particulars under the 13th paragraph, so that the proposed amendment can take place without any amendment of the petition. In this respect the case is materially different from the *West Simcoe Case*, 1 E. C. 128, in which the amendment was refused.

As all the evidence had been given before the motion was made and the amendment is only asked, if the charges are sustained by the evidence, the allowance of it cannot inconvenience the respondent in respect of his evidence, especially as he had notice of the application before the trial. If the evidence sustains the charges or any of them the amendment should be allowed, or allowed as to the charges that are sustained.

As to William Goering I have already said, that in my opinion he was an agent of the respondent. Thomas Loney, as shown by the evidence of Fitzgerald, was a committeeman for the promotion of the election, and was therefore, if for no further or other reason, an agent of the respondent. Both of them were paid for services and were I think disqualified from voting by the provisions of section 5 of the Act. They nevertheless voted. They knew all the facts and whether they actually knew the law or not they must for present purposes be presumed to have known it.

Each of these, then, voted at the election knowing that he had no right to vote thereat, which was a corrupt practice within the meaning of section 160 of the Act. And as I have said each of these persons was an agent of the respondent.

It was contended that the act of voting, being the exercise of a man's franchise and entirely personal to himself could not be an act done under or in pursuance of an agency, and that for this reason the respondent could not have been nor is he affected by these acts of voting even if they were corrupt practices. To this contention I cannot give assent. These men had not at the time they voted the franchise spoken of. They had been or became deprived of it by the facts and the provisions of section 5. They were simply guilty of the "corrupt practice" of voting when they knew they had no right to vote, and were agents of the respondent for the promotion of his election. It may be added that the corrupt practices of which they were guilty were themselves acts in the furtherance and promotion of the election and return of the respondent, who was by reason of their agency responsible for the corrupt acts of each of them. As to these two, the proposed amendment should be allowed, as the evidence referred to in the notice of motion for it, in my opinion fully proves the charge made by it.

As to Foster, I think the evidence falls short of proof, one can scarcely say that there is more than suspicion that he was working in expectation of being paid; as to him I do not think the proposed amendment should be allowed.

The result seems to be that corrupt practices by agents of the respondent have been established under the allegations contained in charge number 113, and that corrupt practices by Goering and Loney, agents of the respondent, have been established under the allegations contained in the amendment allowed, now charge 181; such corrupt practices being, however, without the knowledge or consent of the respondent.

As a consequence of this the election must be held to be void for corrupt practices by agents of the respondent, without his knowledge or consent, unless the case can be shewn to fall under the provisions of section 163, and as to this my recollection is that counsel were to be heard if they or either of them so desired.

As to section 163. These "corrupt practices" having been shewn to have been committed by the respondent's agents, though without his knowledge and consent, the direct effect of which is to avoid the election, it is now to be considered whether the case is one in which the trouble and expense of a new election would be unnecessary and useless, and, as said by Mr. Justice Patterson in the *East Simcoe Case*, 1 E. C. at p. 339, "the criterion is, if the corrupt acts committed by the agent were of 'such trifling nature' or were of 'such trifling extent' that the result cannot have been affected, or be reasonably supposed to have been affected by such acts * * either alone or in connection with other illegal practices at the election."

The acts of Goering and Loney in voting under the circumstances before pointed out may, I think, be considered as comparatively isolated acts to which one could not reasonably attribute any very great consequences or evils beyond the acts themselves. These acts may have affected more than their own number of votes, possibly they did so, but so far as I am able to see there is not good reason for thinking, that any large number of votes was affected by them, and they do not seem to have been a part or parcel of any comprehensive scheme or design or method of procedure in the conduct of the election on the part of the respondent through his agents.

If these two acts stood quite alone I should at least hesitate before saying the case was not one falling under the provisions of section 163 in which the election should not be avoided. As however these acts do not stand alone it is not necessary to pursue this further or with greater particularity.

The other "corrupt practice" proved, namely, the inducing or procuring Beckman to vote under the circumstances before at least in part stated, must, I think, be regarded in an entirely different light.

There was presumably a large number of aliens in the constituency who were not entitled to vote at this election.

The number of these does not appear even approximately by the evidence. It was, however, in the prosecution of the scheme or plan before mentioned, considered necessary to procure 300 blank forms of naturalization papers, and Fitzgerald tells us that the object was to seek to have aliens qualified to vote at the election, to the end, of course, that their votes should be polled or cast in favour of the respondent. Many of the affidavits of allegiance and residence were sworn before Fitzgerald himself, in the central committee-rooms, and as he says on each occasion of his administering the oath he thinks he handed the paper to Goering. The form of these blank papers had been prepared in Fitzgerald's office, he being, as I understand, a practising lawyer in the city—the constituency.

It is not shewn that Goering had sole charge of canvassing amongst the aliens on behalf of the respondent, in the manipulating or carrying out of the scheme or design before mentioned, but it does, I think, appear that he was exceedingly active in canvassing amongst these people, and procuring them to take the oaths of allegiance and residence, sometimes bringing, or at least, having other persons with him. On one occasion he took the trouble, for some purpose, to inform some of these aliens who were present, that the person with him was a lawyer. It appears that while at the rolling mills where a number, I apprehend a large number, of these aliens were working, he took or endeavoured to take the names of all of them, and had the oaths administered to some of them there.

Goering appears to have been an active man working in the central office with the respondent's election agent, and not at all in the position of an ordinary individual, who having done one act designated by the statute as a "corrupt practice," could not reasonably be supposed to have been guilty of other acts of a like character. This act done by him was at the time surrounded by the facts and circumstances to which I allude, and other circumstances might probably be gathered from the evidence making an addition to these surroundings.

Of the 300 blank forms of naturalization papers procured as aforesaid, only 235 are produced. Looking at what is shown to have taken place in respect of many of them, what is one to say in regard to the remaining sixty-five? None of them are produced, though such of them as are shown to have been used were left or rather retained in the custody of Goering and Fitzgerald. It is not shewn that any accident happened to them or any of them, or that, as sometimes occurs, some of the blanks were, so to speak, spoiled on being filled up for use, and all the information there seems to be as to them is, that there was confusion amongst old, or worthless, and perhaps other papers immediately after the election, and some haste on account of the rooms being wanted for other purposes, from which it seems to be desired that the conclusion should be drawn that all these sixty-five papers were lost, whereas the other 235 blanks have been preserved and are produced.

This may have been the fate of these papers, and in argument it was intimated that it would be rude or perhaps worse, to allow oneself to suppose anything contrary to this. All I can say on the subject is, that without any desire to be too particular or suspicious, it is by no means satisfactory to me. It may, of course, be the fact. There is no direct evidence as to what became of these papers; nor, although their custody was with Goering and Fitzgerald, and the use of them, so far as they were or may have been used, was by, or chiefly by the same persons, are we told either definitely or approximately how many of them were used.

In the *East Simcoe Case*, in Appeal, 1 E. C., at p. 342, Mr. Justice Patterson is reported to have said: "I think we may properly test the motive of an act, whether corrupt or lawful, by considering the circumstances under which, and the person by whom it is committed." The learned judge then puts the illustration that he had before put in the *Welland Case*, and then says: "While the extent of this corrupt act being measured by its influence on

the one voter, might be trifling, its nature as an overt act of what appeared, or might be reasonably be assumed to be an arranged system of operations, could not properly be said to be trifling.

In the same case the late Sir Matthew Cameron said at p. 330 : "The quality of one act being essentially bad, the extent of its influence is not to be measured or estimated merely by the number of votes actually proved to have been tainted thereby, but is to be regarded and estimated in connection with the influence of the party proved to be guilty of its commission, and by the opportunities he may have had of resorting to like practices in other cases."

It is true that in the *East Simcoe Case*, the act was an act of bribery. Mr. Justice Osler, however, says at p. 345 : "The legislature has chosen to put it in the same plane in this and other respects with other acts, which, though called corrupt practices, are not *mala in se*. But the Court in considering whether a corrupt act is trifling in its nature or extent, cannot lose sight of the distinction, and will bear in mind that bribery has always been deemed the head and front of election offences," etc., and further on the learned Judge says : "I think it was not intended that any thing like a scrutiny of bribed or corrupted votes should be entered upon or a count of corrupt practices."

I have examined all the authorities referred to upon the argument of this branch of the case and have not found that any of them affords me better information or better rules for considering the subject than does this *East Simcoe Case*.

I am of the opinion that the corrupt practice with which I am endeavouring to deal here must upon the evidence respecting it and its surroundings be considered and deemed to be an overt act of what appears to have been an arranged system of operations. If it could only be said that it might be reasonably assumed to be such an act, that would be all that is required by the illustration or rule twice laid down or stated by Mr. Justice Patterson, but here the case to my mind is much stronger, for I

venture to say that few persons, if any, could have heard, or can peruse the evidence without arriving at the conclusion that it is shewn that there was in fact a preconceived and preconcerted plan of operations in respect to this so-called "alien vote" and that this act was an act done in the effort to carry out this plan, and so, is the sort of overt act mentioned or referred to by Mr. Justice Patterson in the passage to which I have alluded. It is true that it was not an act of bribery, but only a thing prohibited, so far as I can see, but as said by Mr. Justice Osler in the same case, the legislature has chosen to put it on the same plane as bribery in this respect; and understanding what are called the facts, as I think I understand them, and looking towards the opinions of the learned Judges of the Court of Appeal who were in the majority in the *East Simcoe Case*, and the judgment of the late lamented Sir Matthew Cameron, whose judgment was there affirmed as to the subject, or part of it that is important here, I cannot arrive at the conclusion that this "corrupt practice" can be considered to be of a "trifling nature." I cannot but think that looking at it in the light of the opinions to which I have referred, it is of a nature most serious instead of trifling.

Then as to whether or not the act was of trifling extent, I have difficulty in perceiving just what is meant by the expression, but I do not intend to add to what has been said by so many judges in regard to the difficulties in construing or understanding this section.

If the meaning includes the extent of the act, and the other acts of a class presumed (from what appears) to have been done, then I think there is a strong presumption that a very large number, if not all or nearly all of the sixty-five blank papers that are not forthcoming, were made use of in committing, or in the endeavour to commit acts of a like kind. The burden was upon the respondent, and he did not, I think, remove the presumption which it appears to me fairly exists. In this view, which is the only one I can take, the corrupt practice in question cannot, I think, be considered as being trifling in extent.

If I adopt the principle of the *East Simcoe Case*, which I am bound to do, and apply it to the facts as I understand them here, there can, I think, be no conclusion but the one—namely, that the act (this “corrupt practice”) taken alone, cannot be said to be of “such trifling nature,” or of “such trifling extent,” that the result cannot be reasonably supposed to have been affected by it. This might not appear to be so if anything like a scrutiny were intended; but it is said in the *Simcoe Case*, that neither this nor a count of corrupt practices is intended: Mr. Justice Osler, at p. 345. It is there said that one corrupt act may avoid an election, and that act may have been of such a character, or committed in such circumstances, or by such an agent as to raise the doubt whether those who are responsible for the management of the election were trying to conduct it fairly, and that an act of that kind cannot be trifling in its nature, and must be looked at apart from its effect upon the single vote. When I look at this act or corrupt practice, and at the plan of operation of which it is, as I think, the overt act proved, as well as the situation of the person who committed it, and his connection in this plan and mode of operation with the election agent of the respondent, it appears to me that there is a doubt, if not more, as to whether those who were responsible for the management of this election were trying to conduct it purely. In saying this I wholly exonerate the respondent himself, for so far as I know or can discover, there is nothing in the evidence to implicate him personally in anything of the sort, or to show that he did not intend and endeavour to have a pure election.

I am of the opinion that even if nothing more were to be considered or said, this election cannot be upheld as a valid and good election. It may, however, be expected, and perhaps it is quite proper, that I should say something in regard to other illegal practices at the election. These consist, or consist chiefly of the two other corrupt practices proved and above referred to, and certain acts said to have been done by a person known as Colonel Collier, who became

a witness to prove the committing of these acts by himself. When the testimony of this witness was the opposite of that of the respondent, the evidence of the respondent was preferred, and, in my opinion, very rightly. There were too, in regard to perhaps, the most important point of difference, circumstances favouring the testimony of the respondent, and also the evidence of Mr. Fitzgerald looking in the same direction.

According to the evidence of Collier he promised to pay a large number of his own small debts if the respondent were elected, and many of them he did pay pursuant to his promise, as he says. According to what he says he actually bribed two persons, and paid each the amount of the bribe. The number of these is in all about twenty, and in a considerable number of the instances his evidence is corroborated by the persons respectively whom he named. He says (in effect) that he promised and paid the captain of the Salvation Army the sum of \$50 to influence the members of the army. The money he says was promised, if the respondent were elected, and after the election was paid. The captain was not called to contradict what Collier said. No reason was, I think, assigned or given for not calling him. It was said at the trial that the captain was not a voter.

It was not shown of how many persons the Salvation Army in the city of Hamilton consisted, or how many, if any, of these were voters. It is not in my opinion unfair to think that it consisted of a considerable number of persons, and that some proportion of these were voters or had the right to vote. The actual effect of this promise and payment of \$50 in respect to the number of votes, if any, that it gained for the respondent is unknown or at least does not at all appear by the evidence. This is left the subject, and in the region of conjecture, that is, assuming that Collier is, under the circumstances, to be believed when he says he did the acts of promising and paying, or, the act of promising only.

Collier also says that he paid the band master of a certain

band in the city the sum of \$20 to influence the members of that band in favour of Stinson, the respondent. Again it is not shown of how many persons the band consisted, or what, if any, proportion of these were entitled to vote. The effect of this is also left to conjecture.

Collier, according to his evidence, did betting sufficient to win thereby the large sum that he mentions, if his evidence is to be taken as true. The particulars of this betting are not given so as to enable one to say whether or not it embraced illegal practices.

I think it a proper course to receive Collier's evidence as true, notwithstanding all that has been said of him, where it is uncontradicted, especially in view of the fact that there appear at least some instances in which witnesses might have been called to contradict him if what he said was untrue, and were not called, although as it appears to me there were ample time and opportunity so to do. Contradiction in respect to the matter in evidence is always a more satisfactory means of enabling one to say that he does not believe the witness, than an effort to show general bad character respecting matters apart from reputation as to veracity or the absence of it.

That a very considerable number of illegal practices were committed by Collier, must, I think, be taken to be proved. The extent, in fact, of that having relation to the Salvation Army, cannot, on the evidence, be measured with any pretence of accuracy or even an approximation to it. The extent of that in relation to the band, which was, as it appears, placed under the thin covering of a "toot" at the Commercial hotel, is much in the same position.

Collier seems to have acted in a peculiar way in not ascertaining whether or not those whom he sought to influence, were persons entitled to vote; and if so, what was their political opinions or inclination, and also by approaching persons who were, one would say, far above being swayed or influenced by him or any money he had to give. Yet it appears, I think, that he was active, and, as I have said, did many illegal acts of the extent, or pro-

bable extent of some of which I have before spoken. Now, if it be assumed that my conclusion in regard to the corrupt practice of which I have said so much—namely: inducing or procuring Beckman to vote, is not the correct one—then this, the other two corrupt practices proved, and the other illegal practices at the elections, are to be connected or joined together, and looking at all the question answered, can the result have been affected by them, or, can it be reasonably supposed to have been affected by them, it being borne in mind that a scrutiny or the like is not intended by the section of the Act 163.

This, I have considered as well as I am capable of doing, and all I can say is, that I find myself entirely unable to say that I am of the opinion that the result cannot be reasonably supposed to have been affected by them. I am also unable to say that I am of the opinion that the result cannot have been affected by them. I am, therefore, of the opinion that even in this second way of viewing the matter, the election cannot be upheld.

My conclusion is, that viewing this troublesome case, either one way or the other, or in any way that I can view it, the election must be held to be void and so declared.

MACMAHON, J., concurred.

G. A. B.

HALDIMAND.*

DOMINION ELECTION.

BEFORE SIR W. J. RITCHIE, C. J., STRONG, FOURNIER,
TASCHEREAU AND GWYNNE, JJ.

THOMAS WALSH (PETITIONER), *Appellant*.

AND

WALTER H. MONTAGUE (RESPONDENT), *Respondent*.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE
STREET, SITTING FOR THE TRIAL OF THE HALDI-
MAND CONTROVERTED ELECTION.

Scrutineer, agency of—Wilful inducing a voter to take false oath—Corrupt practice—Qualification of voters—Farmer's sons—Oath T—Secs. 90 and 91 and secs. 41 and 45 of ch. 8 R. S. C.—Ballot papers rejected—Finding of trial Judge.

A scrutineer appointed for a polling place at an election under the written authority of a candidate is an agent for whose illegal acts at the polling place the candidate will be answerable.

The insisting by such scrutineer of the taking of the farmer's son's oath T by a hesitating voter whose vote is objected to and who is registered on the list as a farmer's son and not as owner, when, as a matter of fact, the voter's father had died previous to the final revision of the list leaving the son owner of the property, is a wilful inducing or endeavouring to induce the voter to take a false oath so as to amount to a corrupt practice within sections 90 and 91 of ch. 8 R. S. C., and such corrupt practice will avoid the election under sec. 93. STRONG and GWYNNE, JJ., dissenting.

Per STRONG, J.—1. That reading section 41 in conjunction with sec. 45 sub-sec. 2, and the oath T in schedule A of ch. 8 R. S. C. an enquiry on a scrutiny as to the qualification of a farmer's son at the time of voting is admissible, and if it is shown that a larger number of unqualified

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farmer's sons' votes than the majority were admitted the election will be void. (TASCHEREAU, J., contra).

2. Secrecy of the ballot is an absolute rule of public policy and it cannot be waived. Sec. 71 ch. 9 R. S. C.

On this appeal certain ballot papers being objected to:—

Held, that it will require a clear case to reverse the decision of the trial judge who has found as a question of fact whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter.

Also, that where the x is not unmistakably above or below the line separating the names of the candidates the ballot is bad.

APPEAL from the judgment of the Honourable Mr. Justice Street delivered at Cayuga upon the trial of the controverted election of Haldimand for the House of Commons whereby the election petition was dismissed with costs.

The election in question was held on the 5th and 12th days of November, 1887, when the respondent, Walter Humphreys Montague and Charles Wesley Coulter were candidates, and the said Walter Humphreys Montague was declared by the returning officer to have a majority of the votes cast at the said election.

The petition contained, in addition to the usual charges of bribery and corruption, many specific charges with reference to the reception, counting and rejection of ballots, and other charges of irregularity and unlawful practices in connection with the election which by the said petition it was sought to have declared void.

The trial began on Tuesday the 24th January, 1888, and by the direction of the presiding Judge the charges of corrupt practices against the respondent and his agents were first disposed of, and afterwards certain evidence was taken as to charges in the petition of irregularities in the conduct of the said election.

On the fourth day of the trial, Friday the 27th of January, the learned judge proceeded to examine the ballots cast at the said election, and as the result of such counting of the ballots he declared a majority of ten votes to have been cast in favour of the respondent.

On the present appeal a number of ballots which on the scrutiny had been counted either for the respondent or the defeated candidate were objected to. These ballots were

examined by the Court and two ballots which had been allowed for the respondent by the trial judge after examination with a microscope were disallowed, the Court holding that unless the $\times$ is unmistakably above or below the line separating the names of two candidates so marked the ballot is bad.

The findings of the trial judge on the other objected ballots were upheld, the Court holding that it would require a clear case to reverse the decision of the trial judge who had found as a question of fact as to whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter. No decision was arrived at on ballots No. 103 and No. 46.

Ballot No. 103 was cast at polling sub-division No. 4, in the township of Oneida, by one Philip S. Wintermute, and the words "Philip S. Wintermute," were written upon the ballot itself, before it was deposited in the ballot box. Charles Young, the deputy returning-officer at the polling sub-division in question, was called by the respondent at the trial as a witness to support the claim to have this ballot counted. He stated that Wintermute voted as a farmer's son, that his right to vote was challenged, and that when he came back from the voting compartment and handed his ballot to the deputy returning-officer to be deposited in the box one of the scrutineers for Mr. Colter suggested or urged, that a note of the objection to the vote should be made on the ballot-paper itself, and that accordingly he (the deputy returning-officer) then wrote on the ballot-paper the words "Philip S. Wintermute," before depositing it in the box. This ballot was allowed for the respondent in the Court below.

Ballot 46 was a ballot not initialed by the returning-officer and was counted for the defeated candidate by the trial judge after evidence of its identity was given.

The appellant by his notice of appeal limited the subject of this appeal to the following special and defined questions and the rulings and decisions thereon of the learned judge at the trial, viz.:

“ 2. The refusal of the learned judge at the trial to count as votes for Mr. Colter seven of the ballots cast at the said election at polling sub-division No. 2 in the township of Oneida and which, as the petitioner contends, were marked with a second cross by the deputy returning-officer at the said polling station after the voter had returned the same to the officer to be deposited in the ballot box. The said seven ballots were numbered by the county judge upon the recounting of votes after the said election as Nos. 85, 87, 88, 89, 90, 91 and 92.

“ 3. The charge (No. 8 in the particulars) that Frederick Harrison as agent of the respondent did induce Thomas Nixon to take a false oath at the poll and to vote at the said election though not qualified to do so.

“ 4. The charge (No. 20 in the particulars (that Stephen Allen, an agent of the respondent, did induce Robert Dougherty to take a false oath at polling station No. 3, in the township of Walpole, though the said Robert Dougherty was not qualified to vote at the said election.

“ 5. The charge that the deputy returning-officer at polling sub-division No. 4, in the township of Oneida, put into the ballot box and counted ballots not duly received from the electors in the lawful performance of his duties as deputy returning-officer at the said election.

“ 6. The charge that the deputy returning-officer at polling sub-division No. 2, in the township of Oneida, improperly marked ballots received by him at the said election from electors before depositing the said ballots in the ballot box, and thereby prevented the said ballots from being counted at the said election, and the ruling of the learned judge at the trial, rejecting the evidence on behalf of the petitioner, which was tendered by him at the trial in support of the said charge.

“ 7. The charge that many persons voted at the said election who for different reasons were not qualified to vote thereat, and the refusal of the learned judge at the trial to inquire into the right at the time of the election of any person to vote thereat, if the name of such person appeared on the

list of voters as finally revised and certified by the revising barrister, and the rejection by the learned judge at the trial of the evidence tendered on behalf of the petitioner to establish that many persons who voted at the said election had, between the time of the final revision of the voters' lists by the revising barrister at the date of the said election, forfeited the right to vote thereat."

The evidence relating to charges 3, 4, 5, 6 and 7, upon which this appeal was decided, is reviewed in the judgments hereinafter given.

October 3rd, 4th, and 5th, 1888. *Aylesworth* (Colter with him) for appellant.

On the Harrison-Nixon charge (Par. 3 in the notice of appeal) the learned counsel cited and relied on *The Dominion Elections' Act*, secs. 90, 91, 93 and also sec. 45, sub-sec. 2, ch. 8 R. S. C.; *Cooper v. Slade*, 6 H. L. C. at p. 788; *North Norfolk Case*, 1 O'M. and H. at p. 242; *Wallingford Case*, 1 O'M. & H. at p. 59; *The Hereford Case*, 1 O'M. & H. at p. 195; *The Launceston Case*, 2 O'M. & H. at p. 133; *The Carrickfergus Case*, 3 O'M. & H. at p. 91; *The Louth Case*, 3 O'M. & H. 161; *The Selkirk Case*, 4 Cans. S. C. R. 494; *The Soulanges Case*, 10 Can. S. C. R. 652; and Taylor on Evidence 8 Ed. secs. 376-7.

On the Allen-Dougherty charge (Par. 4 in the notice) upon the question of agency *The Stroud Case*, 3 O'M. & H. at p. 11, was referred to. On this charge they referred also to the judgment of Chief Justice Moss in a case referred from the county of Elgin to the Ontario Court of Appeal under the Ontario Voters' Lists Acts—printed in the appendix to Hodgins' Manual on the Law affecting Voters' Lists in Ontario, 2nd Ed., as case No. 8 in *re Norman*.

The learned counsel then argued that the trial judge had erred in refusing to allow witnesses to disclose for whom they had voted in order to prove the truth of charge 6 in the notice of appeal, and contended that the statute was framed solely to leave to the voter the privilege of secrecy if he wished to assert and maintain it. Citing sec. 71 of the Dominion Elections' Act and Taylor on Evidence 8th Ed.

secs. 396, 438 ; McCreary on Elections, 3rd Ed. sec. 453 ; *People v. Pease*, 27 N. Y. 45-81 ; *Reg. v. Kinglake*, 11 Cox C. C. 499 ; *Thomas v. Newton*, M. & M. 48 n. ; *King v. Adey*, M. & Rob. 94 ; Cooley on Limitations, p. 762.

Then as to right to enquire on a scrutiny into the qualification of the farmer's sons at the time of voting the learned counsel contended that sec. 41 ch. 8 R. S. C. must be read as conferring on farmers' sons the right to vote subject to the provisions contained in sec. 45, sub-sec. 2, and in support of his interpretation of the statute in this respect relied upon the judgment in *The South Wentworth Case*, Hodg. 531 at pp. 533-34 ; *The Stormont Case*, Hodg. 21 at p. 44 ; *North Victoria Case*, Hodg. at p. 681 ; Cooley on Limitations p. 762.

M'Carthy, Q. C., for respondent.

As to the Harrison-Nixon charge he contended there was no agency. Matthison and Macaskie on Corrupt Practices, p. 106 ; and cases there cited. Harrison's authority was limited as provided in sec. 36 ch. 8 R. S. C. But, admitting agency, he argued that it was impossible under the circumstances to hold : First, that Nixon took a false oath. There was no ground on which the learned judge could have held that any oath which Nixon was required to take was false in fact, or if false in fact that it was false in the sense in which it would be unlawful for him to take it, namely, knowingly false. Secondly, there was not a tittle of evidence on which the learned judge could have found that Harrison either "compelled or induced" Nixon to take the oath, or that he did so with the belief that Nixon was not in a position to take the oath, or that he did so corruptly within the meaning of the Act, and he submitted that the holding and finding of the learned judge was the only possible one under the circumstances—citing the *Kingston Case*, Hodg. 625.

As to the Allen-Dougherty charge no agency was proved. The scrutineer had not been appointed, and moreover, the facts clearly shew that Dougherty was still a resident on his father's property and could take the oath.

The learned counsel then referred to the irregularities relied on and contended the defeated candidate had suffered no injustice.

As to charge 31. Unless a *primâ facie* case of fraud is alleged and proved there is no right to enquire how a voter voted. On the grounds of public policy the legislature determined that a ballot could not under any circumstances, for the purpose of ascertaining by whom that ballot was marked, be enquired into in a court of justice. In this respect the Ballot Act under the law of Canada differs from the law established in England, where under certain circumstances the court is at liberty to investigate how the ballot has been marked. Clauses 70, 71 and 72, as indeed the whole Election Act itself, clearly indicate that the great object which the legislature had in view was the secrecy of the ballot, and that under no possible circumstances could it ever be made known by any course of procedure how a man had voted; in other words that the ballot was to be absolutely and for all time secret. In Leigh & Le Marchant on Elections, p. 85 in a note; is a statement showing how the peculiar inconsistency to be found in the English ballot is accounted for. In the Canadian law the policy as to the secrecy of the ballot was maintained and the Act is consistent in itself. So that in a scrutiny, if it be determined that an elector was bribed by a candidate or his agent, it is provided that one vote should be deducted from that candidate's poll, without any enquiry or means of enquiry as to how in fact the bribed elector voted, and it may not be at all impossible that the elector may have voted under the secrecy of the ballot different from the way in which he was bribed or corrupted to vote. Nevertheless as there can be no such enquiry the law has provided as the only means of redress that one vote shall be deducted from the candidate's poll. Besides strictly speaking there can be no evidence as to how a man voted other than the production of the paper itself, nor would there be any safety if courts were to deal not upon the ballot which is the vote, but upon the

statement of witnesses as to how they voted. A witness might falsely say he had voted differently from the way in which he had voted, without the slightest fear of detection, and without it being possible to establish that his evidence was wrong. The courts ought not to make any exception. Now with regard to the English mode or method of procedure, to show very clearly that the principle contended for is the right one, there, no examination can be had of the ballot until it be established to the satisfaction of the court that the person who cast that ballot was guilty of an offence which *ipso facto* destroyed his vote. Then by reference to the numbers the ballot can be produced, every care being taken to prevent any other ballot being seen, and upon its being ascertained how he voted, the poll is altered accordingly, whereas the Canadian Parliament deliberately adopted the other rule as above referred to. At the trial the respondent's counsel offered in express terms to waive his objections if any evidence was given to the trial judge upon which he would say that a *primâ facie* case of fraud had been made out. And if this was such a fraud there must surely be evidence of it. It was difficult to conceive how such a fraud could have been practised. For it must be remembered that the voter getting his ballot has an opportunity to see that at that time it is not marked. He folds it up leaving the counterfoil and number exposed, which he exhibits on his return to the polling room to the deputy returning-officer. The deputy returning-officer then removes the counterfoil and in the presence of the voter deposits the ballot which he has brought back to him in the box. The witness that was examined in this case said that was all done and done in the presence of the two scrutineers on each side and the poll clerk, so that the offer was made by the respondent's counsel, if a *primâ facie* case of fraud was made out, to withdraw the objection and allow the petitioner full and ample enquiry. The petitioner's counsel would not avail himself of that offer, and therefore his lordship properly determined not to allow the examination to proceed.

The following authorities were cited :

The North Durham Case, 3 O'M. & H. 1 ; *The Harwich Case*, 44 L. T. 187 ; *The Litchfield Case*, 3 O'M. & H. 139 ; *The Wigtown Case*, 2 O'M. & H. 220 ; Rogers on Election, 2 vol. (15 Ed.) p. 687 ; *Macartney v. Corry*, 7 Ir. C. L. R. 190.

Then the learned counsel discussed the scrutiny charges under the eighth class of scrutiny particulars that farmers' sons voted who were not entitled to vote and contended :

First, that no scrutiny is at all allowed under the Act ; secondly, that no scrutiny could be held because the ballot is conclusive and is the only evidence as to how a man did vote ; thirdly, a man cannot be allowed to say how he voted, and could not be compelled to say how he voted ; fourthly, every person whose name is on the list is entitled to vote.

With regard to the apparent conflict which is introduced by the Franchise Act—by one section of the Franchise Act and by clause 70 of ch. 8 R. S. C.—they have to be reconciled. By the Franchise Act farmers' sons are required to have what is called a continuing qualification, differing from everybody else, and Parliament has evidently for the purpose adopted the oath as the protection. The same thing is done in the Local Legislature, they have farmers' sons and owners' sons and all that class who require to have, just as in this case, a continuing qualification, but under the local Act it has been held in the *Wentworth Case*, and was intimated in the recent case in Kent with the same effect by the learned judges who were there, that there could be no scrutiny upon any ground whatsoever. The oath was the protection that the law intended. For those reasons no enquiry can be made under this head of objection taken in these particulars. *Stowe v. Jolliffe*, L. R. 9 C. P. 446.

December 14th, 1888. Sir W. J. RITCHIE, C. J.—Among the particulars of corrupt practices alleged are the following :—

8. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent, did at polling station No. 6, in the township of

Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll and to vote at said election though not qualified to do so.

20. Stephen Allen, a resident of the township of Walpole, an agent of the respondent, did on the 12th day of November, 1887, induce Robert Dougherty to take a false oath at polling station No. 3, in the township of Walpole, though the said Robert Dougherty was not qualified to vote at said election.

It is provided by 49 Vic. ch. 8, sec. 90 that

Every candidate who corruptly, by himself or by or with any other person on his behalf, compels or induces or endeavours to induce any person to personate any voter, or to take any false oath in any matter wherein an oath is required under this Act, is guilty of a misdemeanour and shall, in addition to any other punishment to which he is liable for such offence forfeit the sum of \$200 to any person who sues for the same.

And by sec. 91 :

The offences of bribery, treating, or undue influence, or any of such offences, as defined by this or any other Act of the Parliament of Canada, personation or the inducing of any person to commit personation, or any wilful offence against any one of the seven sections of this Act next preceding, are corrupt practices within the meaning of this Act.

We have then in this case to look to the seven preceding sections, of which 90 is one, simply to discover what wilful offences are corrupt practices within the meaning of this Act, and under section 90 the wilful offence is the compelling or inducing or endeavouring to induce any person to take any false oath in any matter wherein an oath is required under this Act, and the inquiry is not whether the candidate is guilty of a misdemeanour or not.

If it is found by the report of any court, judge, or other tribunal for the trial of election petitions, that any corrupt practices had been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate the election of such candidate if he has been elected shall be void.

The inquiry then in this case is confined to the question: Whether there has been a wilful offence under sec. 90, and if so, whether it was committed by an agent of the candidate?

Mr. Frederick Harrison represented Dr. Montague under a written authority whereby he appointed Harrison to act in the capacity of scrutineer for him (me) at polling sub-division No. 6, in the municipality of Walpole in the said electoral district of Haldimand.

A voter named Nixon who was on the list qualified as a farmer's son, and qualified only in that capacity, offered himself to vote at this polling place as a farmer's son. William Parker, the scrutineer of the opposing candidate insisted that this voter should be sworn and this is the account he gives of what took place:—

William Parker, sworn—Examined by Mr. Aylesworth—Q. Where were you engaged on polling day? A. Sub-division 6 of Walpole. Q. What capacity? A. As agent at the polls. Q. For whom? A. For Mr. Colter. Q. Were you there when Mr. Nixon came to vote—the last witness? A. Yes. Q. What took place? A. When he came in I said to the returning-officer I want this man sworn: Nixon said what is that for; he said I have voted here three or four times and you have never said anything; I said well I want you sworn; so he turned to go out and the poll clerk, and I am not sure whether others said to him—Q. The poll clerk—who do you mean? A. Andrew Falls: that is the name he didn't remember; the poll clerk said don't go out; if you do you cannot come back again; so he turned and came back, and he said to me what is your objection to my vote, Mr. Parker, you have never objected to it before; and I replied I don't discuss voters' qualifications here, and I turned to the returning-officer, and says, I require him sworn; so the returning-officer took the book to swear him, and I said oath "T," and I looked over and saw the returning officer was reading oath "T" to him, but still he hesitated. Q. Who did? A. Nixon the voter; so Harrison, the other scrutineer, said your vote is perfectly good, Tom; he said take the oath, Tom, take the oath; I will be responsible; so then he took the oath and voted. Q. What oath was read to him? A. Oath "T," the farmer's sons' oath. Q. Did you have a copy of the oath? A. Yes, I had a copy of the Act. Q. How did you know it was oath "T?" A. I just looked over it and could see it. Q. You followed the reading? A. I could see when he began to read what he was reading and I said oath "T" to the returning-officer before he began. Q. And was this part of it, "That I am resident with my father within this electoral district?" A. Yes, sir, that is the last.

And Nixon the voter on his examination says in reply to the question: What was the form of oath administered to you? was it as owner or owner's son or farmer's son or which? Answers, farmer's son.

This oath "T" is the form of oath of qualification of a person whose name is registered as a voter on the list of voters as being a farmer's son, not claiming the benefit of the provision as to occasional absence as a mariner, fisherman or student.

I, (B), solely swear (or if he is one of the persons permitted by law to affirm in civil cases, solemnly affirm) :

1. That I am the person named or purporting to be named, by the name of , (and if there are more persons than one of the same name on the said list, inserting also his addition or occupation) on the list of voters for polling district No. , in the electoral district, (or municipality) of

2. That I am a British subject by birth (or naturalization, as the case may be), and that I am of the full age of 21 years.

3. That I have not voted before at this election, either at this or at any other polling place.

4. That I have not received anything, nor has anything been promised me directly or indirectly, either to induce me to vote at this election, or for loss of time, travelling expenses, hire of team, or for any other service connected therewith ;

5. That I have not directly or indirectly, paid or promised anything to any person either to induce him to vote or to refrain from voting at this election ;

6. That I am a resident with my father, (or if his father is dead, with my mother) within this electoral district, and that I have not been absent from such residence more than six months since I was placed on the list of voters. So help me God.

And this last clause is that which it is claimed the witness could not truthfully take and it cannot be denied that if he did take this oath he did take a false oath in a matter wherein an oath is required under the Act.

This statement of Mr. Parker I must accept as strictly true, because neither the returning-officer nor Harrison, the scrutineer of Mr. Montague, were called to show that oath "T" was not regularly and properly administered, or that any portion of the oath was omitted, and independent of any evidence of Parker in the absence of any evidence to the contrary it must be presumed the returning-officer did his duty. If he did not do so the sitting member should have shewn it.

It is not necessary for me to discuss or decide a question raised on the argument, viz.: whether a voter registered as a farmer's son has a right to choose what oath he will take, because in this case he actually took the farmer's sons' oath, and did not choose or offer to take any other. I may say, however, that if I were called on to express an opinion I should require much more than I have heard in

this case to convince me that a voter so registered has any such right.

The questions then resolve themselves to these: Was Harrison the agent of Mr. Montague at this polling place, and if so, did he compel or induce, or endeavour to induce, the voter Nixon to take the false oath? There cannot be a doubt that, having been authorized to act as scrutineer at the polling place in question, he was there as the agent of the candidate appointing him. The sections of the Act 36, 37 and 38 make this, in my opinion, too plain for argument, they are as follows:

36. In addition to the deputy returning-officer and the poll clerk, the candidates and their agents (not exceeding two in number for each candidate in each polling station), and, in the absence of agents, two electors to represent each candidate on the request of such electors, and no others, shall be permitted to remain in the room where the votes are given, during the whole time the poll remains open;

Provided always, that any agent bearing a written authorization from the candidate, shall always be entitled to represent such candidate in preference to, and to the exclusion of any two electors, who might otherwise claim the right of representing such candidate under this election. 41 Vic. ch. 6, s. 4.

37. Any person producing to the returning-officer or deputy returning-officer, at any time, a written authority from the candidate to represent him at the election or any proceeding of the election, shall be deemed an agent of such candidate within the meaning of this Act. 37 Vic. ch. 9, s. 36.

38. One of the agents of each candidate, and, in the absence of such agent, one of the electors representing each candidate, if there is such elector, on being admitted to the polling station shall take the oath to keep secret the names of the candidates for whom any of the voters has marked his ballot paper in his presence, as hereinafter required, which oath shall be in the form Q in the first schedule to this Act. 37 Vic. ch. 9, s. 36, part.

If an agent, then was Harrison guilty of the corrupt practice attributed to him? The voter, it appears having turned to go out, the poll clerk said to him "don't go out, if you do you cannot come back again," so he turned and came back and after asking Parker "what is your objection to my vote" and receiving the reply, "I don't discuss voters' qualifications here," and requiring him to be sworn; and while, Parker says, "the officer was reading oath T to

him, but he still hesitated.”—(Q. Who did ? A. Nixon the voter.)—Harrison the other scrutineer said : “Your vote is perfectly good, Tom, take the oath, Tom—I will be responsible.” “So he took the oath and voted.” And Nixon himself says in answer to the question :

Did Harrison take any part when your vote was challenged ? A. He insisted that I should take the oath. Q. What did he say ? A. He said my vote was perfectly good. Q. Anything else ? A. That was all ; I took his word and went and voted.

If the scrutineer or agent representing the candidate chose to interfere with the voter and urge him to take an oath he could not truthfully take and, in the language of the voter himself, “he insisted that I should take the oath, he said my vote was perfectly good, I took his word and went and voted :” and further, professed to assume the responsibility of the voter’s doing so, this, in my opinion, was such a wilful inducing or endeavouring to induce the voter to take a false oath as to amount to a corrupt practice.

May it not, indeed, be fairly said that this was something more than mere inducing or endeavouring to induce this voter to take this oath which, but for the agent’s interference, the hesitating voter might not, and from his own evidence, most probably never would have taken, for he says, “I took his word and went and voted ?” Did not this insistence that he should take the oath, and this assumption of responsibility for his so doing, if not amounting to a legal compelling very nearly approach moral compulsion or coercion ? This having been done in a place and at a time when the scrutineer or agent ought not to have interfered with the voter, who should have been left to act as his own judgment and knowledge of his position prompted, and on his own responsibility, constrains me to the conclusion that what Harrison did was done corruptly and wilfully with the intention of securing a vote, at all hazards, for the party whom he was representing ; for I cannot think he would have been so urgent that the oath should be taken if he had not been

well assured for whom the voter intended to vote : and I am the more impressed with this conviction inasmuch as the evidence stands uncontradicted, and I cannot doubt but that Harrison would have been examined at the trial could he have contradicted the evidence of Parker, or have shewn that what he did was done under a misapprehension or mistake either of fact or law, that he honestly believed the voter was entitled to vote and could truthfully take the oath, and that what he did was not done wilfully or corruptly. As no excuse or justification has been put forward for his conduct the sitting member must take the consequence of his improper act and the election must be declared void.

STRONG, J.—I have the misfortune to differ from the majority of the court in the Harrison-Nixon case.

The particulars of this charge are, as they have just been stated by the learned Chief Justice, that Frederick Harrison, who was the scrutineer for the respondent at polling place No. 6, in the township of Walpole, induced Thomas Nixon, whose name appeared on the registry as a voter, to take a false oath and to vote though not qualified, and thereby committed a corrupt act, as an agent, sufficient to avoid the election. It appeared that Nixon was registered as a farmer's son and that his father had died, on the 4th April, 1886, before the final revision of the lists, but that his name was left on the list as a farmer's son ; that the oath administered to him, and which he certainly could not properly take, was oath "T" which reads as follows :

I am a resident with my father within this electoral district, and that I have not been absent from such residence more than six months since I was placed on the list of voters,

and that he nevertheless took this oath.

Two witnesses were examined on this charge, the voter Nixon and Parker, the scrutineer for the petitioner at the poll in question.

What is said by Nixon is as follows:—

Q. Did Harrison take any part when your vote was challenged? A. He insisted that I should take the oath. Q. What did he say? A. He said my vote was perfectly good. Q. Anything else? A. That was all; I took his word and went and voted. * * * *

Q. The deputy returning-officer I suppose, read the oath over to you before you took it? A. Yes, sir. Q. Was this part of it: "That I am a resident with my father within this electoral district and have not been absent from such residence more than six months since I was placed on the list of voters? A. I do not remember that part "with my father, etc."

* * * * *

Q. And when you went in the polling booth, as I understand, the gentleman who was there was Mr. Parker? A. Yes, sir. Q. Who was there representing Mr. Colter, required you to be sworn? A. Yes, sir.

Then Parker is called and he is examined by the counsel for the petitioner:

Q. Were you there when Mr. Nixon, the last witness came to vote? A. Yes. Q. What took place? A. When he came in I said to the returning-officer, I want this man sworn; Nixon said what is that for; he said I have voted here three or four times and you have never said anything:

said, well, I want you sworn; so he turned to go out—the poll clerk and I am not sure whether others said to him. Q. The poll clerk—who do you mean? A. Andrew Falls; that is the name he didn't remember: the poll clerk said don't go out; if you do you cannot come back again: so he turned and came back, and he said to me what is your objection to my vote, Mr. Parker; you have never objected to it before; and I replied I don't discuss voters' qualifications here, and I turned to the returning officer and says I require him sworn; so the returning officer took the book to swear him, and I said oath "T," to him, but still he hesitated. Q. Who did? A. Nixon the voter; so Harrison, the other scrutineer, said your vote is perfectly good, Tom; he said take the oath, Tom, take the oath; I will be responsible; so then he took the oath and voted. Q. What oath was read to him? A. Oath "T," the farmers' sons' oath.

Q. Did you have a copy of the oath? A. Yes, I had a copy of the Act. Q. How did you know it was oath "T"? A. I just looked over it and could see it. Q. You followed the reading? A. I could see when he began to read what he was reading and I said oath "T" to the returning officer before he began. Q. And was this part of it, "That I am resident with my father within this electoral district"? A. Yes, sir, that is the last.

On cross-examination he says:—

Q. You turned to the returning-officer and said what? A. I want him sworn. Q. Now what further? A. He hesitated again and Harrison said your vote is perfectly good, Tom, and he rose partly off his feet, he says take the oath, Tom, take the oath Tom, I will be responsible. Q.

What did you say to that? A. Nothing. Q. Then what did you do? A. Went to the returning-officer, took the book, I said oath "T." Q. Thereby meaning? A. The farmer's sons' oath. Q. Then what did the returning-officer do? A. He read the oath, read the farmer's sons' oath. Q. Did you hear him reading it? A. Yes.

Now upon this evidence the learned judge found that Nixon had a good vote and concluded his adjudication on the charge as follows:—

Now, under those circumstances, can it be found that Mr. Harrison wilfully and corruptly induced Thomas Nixon to take a false oath in order that his vote, which was perfectly good without any false oath, might be put in? I think that such a finding would not be justified by the facts, and I find therefore that Mr. Harrison did not wilfully and corruptly induce Thomas Nixon to take the oath which he did, and I dismiss that charge also.

As regards agency I am not clear that Harrison who was a mere scrutineer, and therefore an agent with a limited authority, was an agent for whose corrupt acts the respondent was according to the general law of elections answerable. But I will assume rather than admit that he was such an agent. We have then to consider the provisions of the law applicable to the cases and these are contained in secs. 90, 91 and 93 of the Dominion Elections' Act:

Sec. 90 enacts that:

Every candidate who corruptly, by himself, or by or with any other person on his behalf, compels or induces or endeavours to induce any person to personate any voter, or to take a false oath in any matter wherein an oath is required under this Act, is guilty of a misdemeanour, etc.

And sec. 91 declares that:

The offences of bribery, treating, or undue influence, or any of such offences, as defined by this or any other Act of the Parliament of Canada, personation or the inducing any person to commit personation, or any wilful offence against any one of the seven sections of this Act next preceding, are corrupt practices within the meaning of this Act.

And sec. 93:

If it is found by the report of any court, judge or other tribunal for the trial of election petitions, that any corrupt practice has been committed by any candidate at an election, or by his agent, whether with or without the actual knowledge and consent of such candidate, if he has been elected shall be void.

Now it is apparent that these provisions do apply to make the inducing a voter to take a false oath by an agent a corrupt practice avoiding the election, provided it is done (as required by section 90) "corruptly," and (as required by sec. 91) "wilfully."

Then can it be said on the evidence that Harrison acted "corruptly" and "wilfully?"—I am of opinion that it cannot. Supposing that Harrison was aware of the father's death, it appears to me that he acted in perfect good faith when, assuming very naturally, though in point of law I admit erroneously, that Nixon, registered as a farmer's son, did not lose his vote because he had become the actual owner of the property on which he had resided with his father, he encouraged him to take the oath appropriate to his actual *status* as a voter. That Harrison did or said anything to induce Nixon to take oath "T" or any other particular form of oath is not proved. He is therefore to be regarded as having instigated Nixon only to take such an oath as appropriate to his case. This I cannot hold to have been a wilful and corrupt inducement to take a false oath.

2nd. Further Nixon was originally registered as a farmer's son and at the time he was registered it was true; his father died in April, 1886, and this election took place in 1887. There is no proof that Harrison knew that Nixon's father was dead, in which case oath "T" would have been the proper oath.

I must hold, therefore, that the act was not a wilful one, was free from any corrupt intent, and I consequently agree in the conclusion of the learned judge at the trial that the charge was not proved.

There is another charge, that Allen, a scrutineer for the respondent, induced Dougherty, a voter to take a false oath. It occurred at polling place No. 3, in the township of Walpole.

This charge, in my opinion, wholly fails. The facts are that Dougherty removed from the house his father resided in into another house on the same farm, but that he

occupied this last house as a caretaker or servant of his father, the possession being clearly in the father. Assuming that agency was proved, and that is a very considerable assumption for there is much doubt about it, I hold with the learned judge that the voter had a perfectly good vote and was able consistently with the truth to take the oath which was administered to him.

3rd. As to the charge that the deputy returning-officer at polling place No. 4, Oneida, put into the ballot box and counted ballots not duly received from electors and which is thus referred to in the notice of appeal :

5. The charge that the deputy returning-officer at polling sub-division No. 4 in the township of Oneida, put into the ballot box and counted ballots not duly received from the electors in the lawful performance of his duties as deputy returning-officer at the said election.

I am clear there is nothing in this case. It relates only to one ballot which could not affect the result of the election. Moreover the county judge on the recount made such an allowance in favour of the defeated candidate as afforded a sufficient remedy for any irregularity which the evidence establishes.

Another case is charge No. 6 in the notice of appeal, viz. :

The charge that the deputy returning-officer at polling sub-division No. 2 in the township of Oneida, improperly marked ballots received by him at the said election, from electors before depositing the said ballots in the ballot box, and thereby prevented the said ballots from being counted at the said election, and the ruling of the learned judge, rejecting the evidence on behalf of the petitioner which was tendered by him at the trial in support of the said charge.

Nothing could be made of this charge without admitting the evidence of voters to show how they voted. This I hold cannot be done. To do so would, in my opinion, be a direct violation of the Act which requires secrecy. Sec. 7, of the Dominion Elections' Act, enacts:

No person who has voted at an election shall, in any legal proceeding questioning the election or return, be required to state for whom he voted.

It is no answer to this to say that secrecy is imposed for the benefit of the voter and that he can waive it, for I hold secrecy to be imposed as an absolute rule of public policy,

and that it cannot be waived. The whole purview of the law is different from the English Act and from the Ontario Act. I am of opinion, therefore, that the learned judge rightly rejected the evidence, though I may not be able to agree with the grounds he put it upon.

The next charge that is important is stated as follows in the notice of appeal :—

7. The charge that many persons voted at the said election who, for different reasons were not qualified to vote thereat, and the refusal of the learned judge at the trial to enquire into the right at the time of the election of any person to vote thereat, if the name of such person appeared on the list of voters as finally revised, and certified by the revising barrister and the rejection by the learned judge at the trial of the evidence tendered on behalf of the petitioner to establish that many persons who voted at the said election, had between the time of the final revision of the voters' list by the revising barrister and the date of the said election, forfeited the right to vote thereat.

This principally relates to the case of farmer's sons whose votes were impeached. It appears to me that the evidence was, if admissible in other respects, material, inasmuch as if it were shewn that bad votes were received more in number than respondent's majority that would be sufficient to avoid the election. Then, as regards the qualification of farmer's sons, I think it clear that the registry was not conclusive, though as regards qualification founded on ownership it appears to be conclusive.

I found this opinion on section 41, which is as follows :

41. Subject to the provisions hereinafter contained all persons whose names are registered on the list of voters for polling districts in any electoral district, in force under the provisions of "The Electoral Franchise Act" or of the Act passed in the session held in 48th and 49th years of Her Majesty's reign and intituled "An Act respecting the Electoral Franchise" on the day of the polling at any election for such electoral district, shall be entitled to vote at any such election for such electoral district and no other person shall be entitled to vote thereat. read in conjunction with section 45 sub-sec. 2 enacting that

Such elector, if required by the deputy returning-officer, the poll clerk, one of the candidates or one of their agents, or by any elector present, shall before receiving his ballot paper, take the oath of qualification in the form S. or in one of the forms T, U, V, or W, in the first schedule to this Act, as the circumstance of the case require—which oath the deputy returning-officer and poll clerk are each hereby authorized to administer.

And the last paragraph of oath "T,"

That I am a resident with my father within this electoral district, and that I have not been absent from such residence for more than six months since I was placed on the said list of voters.

Now I contend that the proper construction of these provisions is that no one is to vote who has not the qualification arising out of a continuous residence subsequent to registration, for I say that sec. 41 is subject to the exception afterwards contained in sec. 45, sec. 2, which by requiring the oath of qualification, makes, in my opinion, the fact of the continuance of the qualification, stated in the last paragraph of oath "T," of residence with the father essential as a preliminary to the right to vote. It is true that it makes the oath sufficient evidence for the purpose of authorizing the reception of the vote, but it does not, in my opinion, make it conclusive evidence, and therefore on a scrutiny further enquiry is admissible, and if it is shewn that a larger number of bad votes than the majority were admitted the election ought to be set aside, though the seat could not, of course, be awarded, inasmuch as no voter can be asked how he voted. *Stowe v. Jolliffe*, L. R. 9 C. P. 446; does not apply. The registry there was conclusive, here it is not.

Therefore it appearing that evidence duly tendered at the trial was improperly rejected, there should be further enquiry and the witnesses whose evidence was so rejected should be examined pursuant to sec. 51 ss. 3 of the Controverted Elections' Act, R. S. C. ch. 9; and the appeal should be ordered to stand over for that purpose.

FOURNIER, J.—La pétition se plaignant de l'élection de l'intimé contient les allégations ordinaires de corruption et allègue en outre que des bulletins ont été admis et rejetés illégalement ainsi que beaucoup d'autres irrégularités, et conclut à l'annulation de l'élection. Sur les trente-neuf accusations de menées corruptrices contenues dans les particularités, l'enquête a eu lieu dans un grand nombre de cas, et a été abandonnée dans plusieurs autres. L'intimé

avait donné avis qu'il procéderait à la preuve sur des accusations récriminatoires. Mais la pétition ayant été rejetée en entier, il ne s'est pas trouvé dans l'obligation de procéder sur ces charges.

Parmi les accusations rejetées par l'honorable juge Street qui a présidé au procès et au sujet desquelles il y a appel, se trouve la huitième qui est énoncée dans les termes suivants :

80. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent did, at polling station number six, in the township of Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll and to vote at the said election, although not qualified to do so.

La preuve de cette accusation faite par Thomas Nixon le voteur lui-même et par William Parker, l'agent de l'autre candidat, W. Colter, est si complète, qu'elle ne laisse aucun doute sur l'existence du fait imputé.

Nixon s'étant présenté pour voter, Parker, l'agent de Colter, le requit de prêter serment ; il s'en plaignit, mais la demande ayant été réitérée, il fit quelques pas pour sortir du poll. Changeant subitement d'idée, il revint sur ses pas et se plaignit de nouveau de ce que l'agent exigeait de lui le serment de qualification. L'agent Parker ayant encore insisté, le député-officier rapporteur commença à lire la formule du serment de qualification pour les voteurs enrégistrés sur la liste des fils de fermiers. Nixon hésitait encore, lorsque Harrison, l'agent du membre siégeant se levant à demi, interrompit l'officier rapporteur en disant au voteur :

Your vote is perfectly good, Tom, take the oath, Tom, take the oath ; I will be responsible.

Immédiatement après ces paroles, Nixon fit le serment requis et vota. Les mêmes faits sont aussi prouvés par Wm. Parker, de la manière la plus positive. Dans son témoignage, Nixon dit à propos de l'intervention de Harrison, que ce dernier voyant l'objection à son vote insista à ce qu'il fit serment.

Harrison insisted that I should take the oath. He said my vote was perfectly good. That was all, I took his word and went and voted.

Le serment prêté par Nixon est celui de la formule T. concernant les fils de fermiers, se terminant par la déclaration :

That I am a resident with my father within this electoral District, and that I have not been absent from such residence more than six months since I was placed on the list of voters, etc., etc.

L'agence de Harrison est prouvée. Il avait été spécialement nommé par écrit pour représenter l'intimé à ce poll. Il était de son devoir de protéger les intérêts de l'intimé en résistant à des objections non fondées qui auraient pu empêcher des voteurs de donner leurs votes en faveur de son candidat. Mais celle qui avait été prise contre Nixon était bien fondée. Porté sur la liste des voteurs comme fils de fermier, demeurant avec son père, il avait, lors de son vote perdu depuis longtemps sa qualification de voteur, par le décès de son père. Il avait aussi laissé la propriété sur laquelle il avait été qualifié lorsqu'il demeurait avec son père, pour aller demeurer avec une de ces sœurs sur une autre propriété. Il n'était enregistré comme voteur qu'en qualité de fils de fermier et en aucune autre qualité sur aucune autre liste. C'est ainsi qu'il a voté. Le serment qu'il a prêté qu'il était résident dans le district électoral avec son père était évidemment faux et tout-à-fait contraire à la vérité. Il donne lui-même la date du décès de son père dans son témoignage comme ayant eu lieu le 4 avril 1886. Sa mère était morte depuis environ dix ans. Il n'a pas prêté le serment sans beaucoup d'hésitation, comme on l'a vu par son propre récit. Sans l'insistance de Harrison, il est clair qu'il serait retourné sans voter. Ses hésitations sont faciles à comprendre, il lui répugnait sans doute beaucoup de faire le serment qu'il résidait avec son père mort depuis 19 mois. Mais pressé par Harrison, son voisin qui savait aussi bien que lui la mort de son père et qui, d'après sa manière de lui adresser la parole, semble être avec lui sur un pied de familiarité intime, il a fini par se laisser persuader qu'il n'y avait pas de mal à faire ce serment ; il a pu tout probablement se croire dégagé en conscience de toute

responsabilité par le ton persuasif et la persistance de Harrison à lui répéter que son vote était bon et à lui dire de voter, qu'il prenait tout sur sa responsabilité. Sans l'intervention de Harrison, il eût sans doute suivi sa première pensée de s'en aller sans voter; évidemment ce vote n'est dû qu'à la pression exercée sur Nixon par Harrison. Ce dernier ne pouvait certainement pas être de bonne foi lorsqu'il agissait ainsi, il ne pouvait ignorer la mort du père de Nixon dont une des propriétés adjoignait la sienne. Dans tous les cas puisqu'il prenait sur lui d'affirmer la validité du vote, tandis qu'il était clairement illégal, sa conduite a eu l'effet de rendre l'intimé responsable des conséquences de son action. S'il ignorait la véritable position de Nixon fils, il aurait dû s'en informer avant d'en parler avec autant d'assurance qu'il l'a fait. Comme tant d'autres, il a mis plus de zèle que de discrétion dans l'exercice de ses fonctions comme agent et son principal doit malheureusement en supporter les conséquences.

Harrison s'est donc en connaissance de cause rendu coupable du fait d'induire Nixon à faire un faux serment. L'offense qu'il a ainsi commise est définie comme suit par la section 90 de l'acte des élections, déclarant :

That every candidate who corruptly by himself, or by any other person on his behalf, induces or endeavours to induce any person to take any false oath in any matter wherein an oath is required under the Act, is guilty of a misdemeanour.

Par la section suivante, 91^{me}, il est déclaré que

Any wilful offence against any one of the seven sections of this Act next preceding, are corrupt practices within the meaning of this Act.

Le fait d'avoir induit Nixon à faire un faux serment est clairement, d'après ces sections, une menée corruptrice commise par un agent de l'intimé, et a eu en conséquence l'effet d'affecter la légalité de l'élection.

Dans la section 90, le mot *corruptly* ne signifie pas d'une manière absolue que l'acte, qualifié ainsi, a été fait dans un but immoral, malhonnête ou avec malice. Ce mot y est plutôt employé pour signifier que l'acte visé par cette expression est une violation de la prohibition du statut à cet égard (*Cooper v. Slade*, 6 H. L. Cas.). Il n'était

pas nécessaire de faire la preuve que Harrison, en agissant comme il l'a fait, avait une intention malhonnête et immorale. Toutefois il n'a pas offert son serment pour expliquer ses recommandations. Cependant l'opinion de l'honorable juge a été que la preuve de l'intention de Harrison aurait dû être faite, mais elle est contraire à l'interprétation adoptée par les autorités suivantes :

All the judges have considered that the word 'corruptly'..... means, with the object and intention of doing that thing which the statute intended to forbid. It does not mean corrupt in the sense in which you may look upon a man as being a knave or a villain.

Per Mr. Justice Blackburn in *The North Norfolk Case*, 1 O'M. & H. 236, at page 242.

And in discussing the meaning of the word in considering whether treating had or had not been done corruptly, Mr. Justice Blackburn says, "the point to be considered is, Was it given with an intent to influence the election?"

The Wallingford Case, 1 O'M. & H. 57, at p. 59.

The word 'corruptly' means contrary to the intention of this Act, with a motive or intention by means of it to produce an effect upon the election.

Per Mr. Justice Blackburn in *The Hereford Case*, 1 O'M. & H., at p. 195.

This language is quoted with approval by Mr. Justice Mellor in *The Launceston Case*, 2 O'M. & H. 129, at p. 133.

And by Mr. Baron Dowse in *The Carrickfergus Case*, 3 O'M. & H. at p. 91.

See also, on the same subject, *The Louth Case*, 3 O'M. & H. 161.

Harrison connaissait parfaitement l'objection faite à Nixon, il avait entendu Parker demander l'administration du serment suivant la formule T. au sujet du fils de fermier; il avait été témoin des hésitations de Nixon, mais sa crainte de perdre un vote pour l'intimé le dominait tellement, qu'il a exercé toute la pression dont il était capable sur ce jeune homme pour l'engager à prêter un serment faux. Non seulement Harrison avait l'intention d'assurer un vote à son candidat, mais il y a mis de la persistance et l'a obtenu au moyen d'un serment faux. Il est inutile d'en dire davantage pour prouver que l'acte de Harrison a été fait volontairement et non par inadvertance. Il a manifesté sa volonté assez souvent et n'a dû son succès qu'à ses efforts réitérés. Quels que soient les motifs qu'on lui suppose son acte a été au moins *wilful*

dans le sens d'intentionnel, tel qu'il a été interprété par cette cour dans la cause de l'élection de Selkirk, *Young v. Smith*, 4 Can. S. C. R. 494.

Je suis en conséquence d'avis que pour ce seul fait de Harrison l'élection doit être annulée et l'appel maintenu avec dépens.

TASCHEREAU, J.—I am of the opinion that this election should be annuled on the Harrison-Nixon charge, at No. 6 Walpole polling division.

The facts relating to this charge are as follows :

Thomas Nixon voted at the election. His name was on the voters' list as a farmer's son and not in any other capacity. He is an unmarried man, living with his sister, on the property in respect of which he voted ; his mother died some years ago, his father also at the time of the election, had been dead a little more than nineteen months.

Nixon's post-office is Hagersville, and he has lived on the place ever since he was born.

The respondent's agent at this polling place was Frederick Harrison whose post-office is also Hagersville, and who appears assessed as owner of the next farm to Nixon, in the adjoining concession.

When Nixon came to vote, one of the scrutineers at the poll required that he should be sworn ; Nixon expostulated, but the demand was repeated, and Nixon thereupon turned to go out, but came back and again remonstrated with the scrutineer, and was again met with the demand that he be sworn.

The deputy returning-officer began to read to him the form of oath for persons registered on the list as farmers' sons, but Nixon still hesitated, when Harrison partly rising off his feet and interrupting, said : " Your vote is perfectly good, Tom ; take the oath, Tom, take the oath ; I will be responsible," and thereupon Nixon took the farmers' sons' oath and voted.

Nixon states in his account of what took place, that on his vote being challenged Harrison " insisted that I should

take the oath. He said my vote was perfectly good. That was all ; I took his word and went and voted."

On these words the petitioner alleges the said Harrison, an agent of the respondent, induced or endeavoured to induce the said Thomas Nixon to take a false oath when tendering his vote at the polls and was thereby guilty of a corrupt practice under the Dominion Elections' Act, sec. 90 which provides that every candidate who corruptly by himself, or by any other person on his behalf, induces or endeavours to induce any person to take any false oath in any matter wherein an oath is required under the Act, is guilty of a misdemeanour, and sec. 91 by which any wilful offence against the preceding section is made a corrupt practice within the meaning of the Act. As to the facts there can hardly be any dispute.

First, as to Harrison's agency, there is no room for doubt. He was specially appointed by the respondent in writing to represent him at this poll, and it was in the course of his duty as such representative of the respondent that he interfered to have Nixon's vote taken.

2nd. The oath which Nixon took was unquestionably taken in a matter wherein the statute required an oath to be taken. One of Colter's scrutineers requiring it, Nixon could not get a ballot paper without taking the oath, and the farmer's sons' oath, he being on the list as such, was the only one that could be administered to him as was shown.

3rd. It is as conclusively established that the oath he took was a false one. He swears that he was then resident with his father within this electoral district ; yet his father had been dead nearly two years.

4th. Harrison induced Nixon to take the oath. In fact, he would not have taken it, it is plain from the evidence, if Harrison had not interfered to induce him to do so. He says that Harrison insisted he should take the oath, and he said " my vote was perfectly good. I took his word and went and voted."

Now, was this act of Harrison a wilful act and one

corruptly done within the meaning of the Elections' Act? It is settled law that the word "corruptly" as used in sec. 90 of the Elections' Act does not mean "wickedly, immorally or dishonestly," neither can it mean "consciously" or with intent to commit an offence. The word means, as per Lord Cranworth, in *Cooper v. Slade*, 6 H. L. C. 746; "in violation of that which this statute was passed to prohibit."

Here Harrison's object and intention is manifest. He heard the objection raised to Nixon's vote; he knew the point of the objection, as the scrutineer who objected had also stated the particular form of oath which he demanded to be administered, viz. :—that for a farmer's son not claiming the benefit of the provisions as to occasional absence; he had seen Nixon in the first place turn away unwilling to take the oath; he saw him then hesitating; the voter was a young man; Harrison was manifestly alarmed lest a vote should be lost to the respondent if something was not promptly done to reassure the voter and encourage him into taking the oath; he hastened to assume the responsibility of what he was urging Nixon to do; he heard the oath read containing the averment of residence with the father, but said not a word to retract or modify the urgency of his previous language; he manifestly acted with the object and intention of securing the vote at all hazards, even though it was necessary that the untrue oath should first be taken.

He could not have believed that Nixon's father was living; and the respondent did not attempt to bring him in the witness box to swear to that belief. He lives in the same place as Nixon, and is the owner of a farm next to Nixon, in the adjoining concession. He knows him intimately as is evidenced by the familiar way in which he addresses him "take the oath, Tom, take the oath?"

This with the fact of his not coming forward to swear the contrary cannot but create a strong presumption that he knew of Nixon's father's death. But even without this knowledge the corrupt act is proved. He induced

Nixon to knowingly, wilfully and corruptly take a false oath required by the Act, for he must have known that the farmer's sons' oath was the only one that Nixon could give so as to vote. This is what the Act in plain terms declares to be a corrupt practice. And the *scienter* of Harrison is immaterial. If an agent assumes recklessly to induce a voter to take an oath without previously ascertaining or taking any steps to ascertain whether that oath will be true or not, and the oath turns out to be a false one, I think it clear that this agent has committed the offence created by section 90 of the statute. He has procured a vote, which, without that false oath, could not have been recorded. He has consequently acted "in violation of that which the statute was passed to prohibit." To say that Harrison's *scienter* was necessary to complete the offence, is to say that he must have been guilty of subornation or perjury. Now it is, as I read the section, something more than subornation of perjury that Parliament has legislated against, another and different offence that it has created. And I cannot see that the fact that the statute has declared this to be a misdemeanour makes any difference. No *mens rea* no *scienter* is necessary where a statute prohibits the very act that has been done, neither is *ignorantia juris* or *ignorantia facti* an excuse. In *R. v. Prince*, 13 Cox, 138; for instance, the defendant having been found guilty of abducting a girl under sixteen the court held the conviction right although the jury had found that the prisoner reasonably believed the girl to have been eighteen. In *R. v. Bishop*, 5 Q. B. D. 259; also it was held that under a statute which prohibits the receiving of lunatics in a house not licensed, the owner of a house who had received lunatics was guilty of the offence enacted by the statute, though the jury found that he believed honestly and on reasonable grounds that the persons received were not lunatics.

These cases show that ignorance of fact is no excuse where the act is prohibited by the statute, and go further even than it is necessary to do in to the present case. So

under a statute imposing a penalty for having adulterated tobacco the defendant was held liable to the penalty, although he did not know that he had such tobacco in his possession. *R. v. Woodrow*, 15 M. & W. 404. I also refer to *Attorney-General v. Lockwood*, 9 M. & W. 378, 401; *R. v. Marsh*, 4 D. & Ry. 261.

In *Cundy v. Lecocq*, 13 Q. B. D. 207; Stephen, J., said:—

I do not think that the maxim as to the *mens rea* has so wide an application as it is sometimes considered to have; in old times and as applicable to the common law or to earlier statutes, the maxim may have been of general application, but a difference has arisen owing to the greater precision of modern statutes, and it is necessary to look at the object of each Act to see whether and how far knowledge is of the essence of the offence created.

I refer also to the case of *Young v. Smith*, 4 Can. S. C. R. 494; in this court, and to *The State v. Perkins*, 42 Vermont 399.

In *Mierelles v. Banning*, 2 B. & Ad. 909; the word “knowingly” was in the statute as an ingredient of the offence there charged, and consequently the case has no application here. This word “knowingly” has no doubt purposely been left out of the clauses of the Elections’ Act which declare what will be corrupt practices.

As to the offence being wilful, I need only refer to the case of *Young v. Smith*, 4 Can. S. C. R. 494; in this court, hereinbefore cited. Harrison wilfully induced Nixon to take the oath, that oath was false; this constitutes a wilful offence in the sense of the Election Act. If a man wilfully does an act which the statute declares to be an offence, he is guilty of an offence against the statute. See *R. v. Holroyd*, 2 M. & Rob. 339; and *Hudson v. McCrae*, 4 B. & S. 585.

I may notice that what the Act declares illegal is the inducing to take a false oath. It does not say, “inducing to commit perjury.” So that if the oath is a false one, whether the party taking it knew it to be so or not, the inciting to take it would appear to fall under this Act. Nothing in this case, however, turns upon this.

As to the petitioner’s claim for the seat, it must be dismissed.

The evidence of thirty-six voters to show that they had voted for Colter at polling division No. 2 Oneida, was properly held not admissible by the learned judge at the trial.

Had the learned judge permitted the enquiry to have been prosecuted as the petitioner desired, it would have in effect disclosed not merely how those willing to tell had voted, but practically how every man at the poll had voted, because if out of one hundred votes fifty are found to have voted for A. and fifty for B and the fifty who voted for A. are called and expressing their willingness to tell, do tell that they voted for him, it at once becomes known who the fifty were who voted for B., although they may be most unwilling that that fact should be disclosed. It would be interfering, therefore, with the overriding principle prevailing throughout the Ballot Act, and which embodies a great public policy, had the learned judge permitted the evidence to be given.

The evidence tendered by the petitioner to prove that a certain number of farmers' sons who had voted had no right to vote was also properly declared inadmissible. The list coupled with the oath, when the oath is required, is conclusive as to their right to vote.

The other irregularities complained of on this appeal could not affect the result of the case, in the view I take of it.

The appeal should, in my opinion, be allowed with costs and the election set aside.

GWYNNE, J.—The scrutiny of ballots having resulted in leaving unaffected the right of the respondent in the election petition to retain the seat the only material points upon which, in view of the judgment arrived at by the majority of the court, it is necessary for me to express any opinion, are the two charges of corrupt practices made in connection with the cases of Thomas Nixon and Robert Dougherty.

These charges were as follows :

1. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent did, at polling station number six in the township of Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll, and to vote at said election though not qualified to do so.

2nd. Stephen Allen, a resident of the township of Walpole, an agent of the respondent, did on the 12th day of November, A. D. 1887, induce Robert Dougherty to take a false oath at polling station number three in the township of Walpole, though said Robert Dougherty was not qualified to vote at said election.

These charges are based wholly upon sections 90 and 91 of the Dominion Elections Act, 49 Vic., ch. 8. These sections are as follows : See *ante* p. 545 :—

Before enquiring into the evidence adduced in support of these charges, it will be well to determine first what is the nature of the offence therein pointed at under the words “induce any person to take a false oath in any matter wherein an oath is required under this Act” and how it can be committed and proved.

By the Dominion Act, 49 Vic. ch. 154 of the Revised Statutes of Canada which is a consolidation of, and substitution for, the 1st, 2nd, 6th and 7th sections of the Dominion Statute 32-33 Vic. ch. 23, and the 1st sec. of 33 Vic. ch. 26 it is among other things, enacted that

Every person who (having taken an oath, affirmation, declaration or affidavit in any case in which by any Act or law in force in Canada or in any Province of Canada it is required, or authorized, that facts, matters or things be verified or otherwise assured or ascertained, by or upon the oath, affirmation, declaration or affidavit swears or makes any false statement as to any such fact, matter or thing, is guilty of wilful and corrupt perjury and liable to be punished accordingly.

A false oath to constitute perjury at common law must be taken in a judicial proceeding before a competent jurisdiction, but the taking a false oath before a person competent and authorized to administer it, although the oath be not in a judicial proceeding, is a misdemeanour at common law,

though perjury cannot be assigned upon such an oath unless it be under the provision of some statute *The Queen v. Chipman*, 1 Den. C. C. 432; *Regina v. Hodgkiss*, L. R. 1 C. C. R. 212; but the above statute, ch. 154 of the Revised Statute does make the taking a false oath in any case which, by any Act or law in force in Canada, it is required or authorized that any fact, matter or thing be verified upon oath to be perjury; so that it is clear that perjury can be assigned upon and for the taking of a false oath in any matter wherein an oath is required under the Dominion Elections' Act, and the procuring or suborning any person to take any such false oath is a misdemeanor and punishable as such wholly independently of the 90th section of the said Dominion Elections' Act. The punishment for such offences is provided by the above ch. 154 of the revised statutes which enacts as follows:—

Every one who commits perjury or subornation of perjury is guilty of a misdemeanour and liable to a fine in the discretion of the court and to fourteen years imprisonment.

Now the 90th sec. of the Elections' Act does not create any new offence or constitute that to be a misdemeanour which was not already a misdemeanour independently of the section; what it points at is, as appears plainly by the language of the section, an act which is already recognized by law to be a misdemeanour, to which offence punishment is by law already annexed, and the object of the section is to add to such punishment, a further punishment namely—that the person who is guilty of a misdemeanour of corruptly inducing or endeavouring to induce any person to take any false oath in any matter wherein an oath is required under the Act, in addition to any other punishment to which he is liable for such offence, shall forfeit the sum of \$200 to any person who sues for the same; and the 91st sec. makes the wilful committal of the offence specified in the 90th sec. a corrupt practice under the provisions of the Election Act, so as not only to avoid the election of the candidate who may be guilty of the offence, but to disqualify such candidate for the period of seven years

from being capable of being elected to the House of Commons and of sitting therein, or of voting at any election of a member of that House, or of holding any office in the nomination of the Crown, or of the Governor-General of Canada.

Before a judge sitting without a jury, as he does upon an election petition, finds any one guilty of an offence to which such extremely penal consequences are annexed, he should be, and on an appeal from his decision this court should be, well assured of the true construction of the sections of the Acts under consideration, and that the offence to which such penal consequences are annexed has been clearly established by evidence no less sufficient than would be required to justify a conviction by a jury upon an indictment for the offence.

Now, as to the construction of the secs. 90 and 91, it is expressly provided by them taken together that the offence of inducing a person to take the false oath referred to therein consists in wilfully and corruptly (in the sense that those words are used in an indictment for subornation for perjury), inducing a person to take an oath in a matter wherein an oath is required to be taken by any Act of the Dominion of Canada, false swearing in which oath is by the before herein mentioned ch. 154 of the revised statutes of Canada made a misdemeanour for which the person taking the oath might be indicted for and convicted of perjury.

Now the offence of wilfully and corruptly inducing or procuring any person to take such an oath is the misdemeanour known in law as a subornation of perjury, to the complete perpetration of which offence knowledge of the falsity by the person accused is essential; and this is the law also in the case of an indictment for the misdemeanour of procuring or inducing another to take a false oath, upon which perjury could not be assigned, both misdemeanours as to the elements constituting the offence standing precisely on the same footing. Formerly it was necessary to be expressly averred in the indictment, but now if the

party who is charged with having corruptly induced Nixon to take the oath which he did take was indicted for that offence, it would be sufficient to set out the substance of the offence in the manner prescribed by the 108th sec. of ch. 154 of the revised statutes, which is, verbatim, identical with the 21st sec. of the Imperial Statute 14-15 Vic. ch. 100 and enacts that:

In every indictment for subornation of perjury or contracting with any person to commit wilful and corrupt perjury or for inciting causing or procuring any person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously or corruptly to take, make, sign or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient whenever such perjury or other offence aforesaid has been actually committed to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully and corruptly did cause and procure the said person to do and commit the said offence in manner and form aforesaid; and whenever such perjury or other offence aforesaid has not actually been committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury.

That is to say without setting forth the bill, answer, information, indictment, declaration or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

Upon an indictment for subornation, since the passing of 14-15 Vic. ch. 100, it is as necessary as it was before that it should be proved:—1st. That perjury had been committed by the person who took the oath and unless that be proved the defendant cannot be convicted of the subornation. Secondly, the subornation or previous inducement or procurement to commit that offence—that is to say, it must be proved that the defendant solicited or procured the person who took the oath to take it, knowing the same to be false, or that by taking it the party so doing would be committing perjury, Archbold's Criminal Pleading Edit. 1886, p. 942; Roscoe's Criminal Evidence, 10 Edit., 1884, p. 864.

Now, that any person can be pronounced by a judge sitting upon the trial of an election petition to have been guilty of an offence of this nature upon less evidence than would be required upon the trial of an indictment for the same offence before a jury, is a proposition which neither in law or justice or common sense can, in my opinion, be entertained.

That a judge without a jury should be authorized to try a charge of an offence of this nature is a sufficiently grave departure from the ordinary rule that no one can be convicted of a criminal offence, especially one so seriously affecting his civil rights and liberty, except by a jury; we cannot, however, extend by construction the penal character of the act so as to hold that it justifies an adjudication of guilt unless it be established by as complete and sufficient evidence as would be required on a trial before a jury.

Now as to the evidence adduced in support of the charge. Nixon himself was called upon behalf of the petitioner and also a Mr. Parker, who acted as scrutineer for the candidate in whose interest the petition was filed, at the polling place where Nixon voted. The material evidence given by him and by Parker on his cross-examination which, where it differs from that as taken down upon his examination in chief, appears to me to be more reliable, in short substance is, that when Nixon came forward to get his ballot paper Mr. Parker said to him that he required him to be sworn, upon which Nixon turned towards Parker and said to him, "what is your objection to my voting, Mr. Parker, I have been here several times and you never questioned it before?" To which Parker replied that he did not discuss voters' qualifications there, and turning to the returning-officer said, "I want him sworn;" at this point Harrison intervened and said, "your vote is perfectly good, Tom." Nixon swears that all that Harrison said to him was,—your vote is a good one or perfectly good, he repeated several times that this was all the insisting he did—all that he said or

at least that he Nixon heard—that otherwise Harrison never spoke to him upon the subject of his vote either then or previously—that he, Nixon, had never heard that his right to vote was doubted, and that he had not any expectation that his vote would be objected to or that he would be required to be sworn.

Parker admits that he did not state what was his objection to Nixon's voting although asked by Nixon what it was, and that he knew that since the death of Nixon's father (which occurred in April, 1886, while the election took place in Nov., 1887), he Nixon was the owner of the property in respect of which he was upon the voters' list with the description added of farmer's son, and upon which he had resided all his life; he says, however, that when Harrison said to Nixon that the vote of the latter was perfectly good, he added, "take the oath, Tom, I will be responsible." Nixon swears that if Harrison said this he did not hear it, and he denies that to his knowledge Harrison did make use of this expression. Upon this contradiction, if it be material whether in point of fact Harrison did or not make use of these words, they cannot, upon a charge of this nature, be regarded as proved to have been used by him. If the words were used, as Nixon swears that he never heard them, they could not have operated upon his mind to induce him to take the oath he might be required to take or did take; and so, unless the substance of the offence charged is to be wholly disregarded, because it is alleged to have been committed at an election, and the accused is to be convicted on a mere technicality, it becomes immaterial whether the words were used or not, if the person to whom they are alleged to have been addressed by way of inducement to get him to take a false oath never heard them. Hereupon Parker called upon the deputy returning-officer to administer the oath "T"; whether Nixon heard Parker say to the returning-officer that the oath "T" was the one he should administer, or that Nixon had any knowledge of the matters contained in such oath there is no evidence.

No reference had been made to the contents of the oath or as to what Nixon would have to swear—an oath was administered which Parker says was the oath “T,” and now we see exposed the gist of the charge and the point of objection to Nixon’s vote becomes developed ; an objection which does not appear to have been in the mind of any one but Mr. Parker, at the election, and which he studiously suppressed.

Nixon in his father’s lifetime was registered on the voters’ list as a voter in the character of farmer’s son. His father died in April, 1886, his mother had died eight or nine years previously. Upon his father’s death Nixon became owner of the property upon which his father in his lifetime resided and upon which Nixon himself had resided all his life, and was still residing at the time of the election in November, 1887. Nixon swears that at the time of the election, in November, 1887, he did not know in what character he was entered upon the voters’ list then in use, namely, whether as farmer’s son or as owner. We have seen that the point was not alluded to at the election. Now the oath, T., assuming it to have been, as Mr. Parker swears it was, the oath administered, in its last paragraph contains these words—“with my father” which if they had been omitted when the oath was being administered every syllable in the oath could have been sworn by Nixon with the most perfect truth, and laying out of consideration all questions as to whether the deputy returning-officer would have been justified or authorized in omitting them if he had known all the facts of the case, the oath with these words left out would have been in conformity with the circumstances and facts of the case as they in truth existed, and if they had not been omitted but Nixon had never heard them he never could be convicted of having taken a false oath, such offence involving, as of necessity it must, knowledge of the falsity and a deliberate intention to take the oath with such knowledge; so that upon this ground alone the charge against Harrison must fail. Upon this point Nixon in substance swears that to

his knowledge and belief these words "with my father" or the words—"I am residing with my father" were not in the oath that he took—that he has no remembrance of hearing anything of the kind.

With the greatest deference I must express my dissent from the doctrine that upon a charge of the grave nature of the misdemeanour charged here there is to be any presumption that the officer who presided at the election did or did not administer the right oath or did or did not omit any part of it. The charge is one of a grave misdemeanour charged against the agent and upon such a charge nothing is, in my opinion, to be presumed. The maxim *omnia præsumuntur rite esse acta* does not, in my opinion, apply to supply any defect in evidence adduced for the purpose of establishing the commission of the misdemeanour. Everything must be clearly proved which constitutes the perfection of the offence, and neither the agent nor the candidate is called upon to prove anything. I can see no reason whatever in principle why this offence should be established on less conclusive evidence than on an indictment, and any imperfection or insufficiency in the evidence enures to the benefit of the person accused who must be acquitted of the charge if not conclusively proved. But independently of this and confining myself to the charge of corrupt inducement made by Harrison to procure Nixon to take the oath, I confess that I am unable to perceive upon what possible foundation that charge could in reason and common sense be maintained. There was no evidence offered that Harrison had any knowledge of the true facts of the case. And assuming him to have known them as they now appear to have been, but which do not seem to have been alluded to by any one at the election, it seems to me a perversion of language to attribute the epithet "corruptly" to the opinion given by Harrison that Nixon's vote was perfectly good, even if that opinion had been supplemented by the expression, "take the oath Tom, etc., etc.," as testified by Mr. Parker. This gentleman appears to have been of opinion, that

although Nixon had a good vote while his father lived he ceased to have a vote when, by his father's death, he became absolute owner of the property upon which, in his father's lifetime, they had both resided. Harrison may, I think, be excused if he entertained, although it might be erroneously, a different opinion.

The point, indeed, is one upon which lawyers, much less laymen, might differ without justly subjecting those who might be of opinion that Nixon had a good vote, under the circumstances, to the imputation of corruption in expressing that opinion. In his father's lifetime he was upon the voters' list as a voter in the character of a farmer's son. By the Dominion Franchise Act he could have been upon the list as a farmer's son only in the event of his not being otherwise qualified to vote in the electoral district in which his father's farm is situate. 49 Vic. ch. 5 sec. 3 ss. 7. The father died on the 4th April, 1886, and although upon his death the son became absolute owner and sole occupant of the property upon which he had, in his father's lifetime, resided with his father, as the assessment takes place between the 15th February and the 30th April, the father may have been assessed for the property in that year before his death, so that the revising officer may have had no opportunity of correcting the voters' list in that year; but in 1887 the son was the sole occupant of the property and the only person who was assessable for it, and as owner and occupant. He had a right therefore to remain on the voters' list in 1887, though not as a farmer's son. His name could not have been removed from the list. He was qualified to be upon it as owner of the property, he was in point of fact on it, though not described as owner, but he could not have been removed from the list, although the character in which he was entitled that his name should remain there was changed. Provision is made for such a case by section 16 of the Electoral Franchise Act, which enacts:—

The revising officer shall not remove the name of any person on the list of voters, from such list, on the ground that the qualification of such

person is incorrectly entered thereon, if it appears that such person is entitled to be registered on the list of voters as possessed of any of the qualifications set forth in the Act, but the revising officer shall retain the name of such person on the list and correct the same accordingly.

At the time of the election in Nov., 1887, Nixon's right then was to be on the voters' list in the character of owner, and if not on the list in that character that was the fault of the officials upon whom were imposed by the law the duties necessary to be discharged in order to ensure that the voters' list should be correct. Now by the Act 49 Vic. ch. 8, sec. 41—all persons whose names are registered on the list of voters in force on the day of the polling at any election shall be entitled to vote at such election. The Act does not say that he shall be entitled to vote only in the character in which he is described, and it may be erroneously described, on the list. By section 45 of this same Act, if his name is on the list, he is entitled to demand and receive a ballot paper, and the only restraint upon the right which is imposed by the statute is that if required he shall take the oath of qualification in the form S. or in the forms T. U. V. or W, in the first schedule of the Act mentioned, *as the circumstances of the case may require.*

Now, under the circumstances of Nixon's case, without expressing any opinion as to whether or not Nixon's vote was in strict law a perfectly good one, or whether or not the peculiar circumstances of the case were such as to entitle him to demand and receive his ballot paper upon taking the oath appropriate to be administered to an owner of property all that it is necessary to say, and upon this I express a very decided opinion, is that laymen certainly, and I think lawyers also, might without any corrupt intent whatever and indeed very conscientiously entertain and express the opinion that the fault of the officials to discharge their duty had not disfranchised Nixon, and that as he was qualified to be on the list, and was in fact upon it, although erroneously described, his vote was a good vote, and as owner, that being the

character which should have been annexed to his name upon the list, and under the peculiar circumstances of the case the appropriate oath to have been administered to him would have been the oath which should have been administered to an owner of property; and, assuming Harrison to have known all the circumstances of the case, the evidence as to what he said at the polling booth is perfectly consistent with his having entertained this opinion, and with this being all he intended to convey. Hereafter lawyers who may be interested in an election, and who I presume cannot claim any exemption from liability upon a charge of this nature which a layman cannot have, will need to be very careful indeed that in giving advice in an election as to the right of any person to vote and as to the form of oath he may be required in law to take, he gives no opinion, however conscientious, which a court can pronounce to be erroneous, for if the court should differ from him (which unfortunately sometimes happens) he would become guilty of the misdemeanour of which Harrison has been pronounced to have been guilty and for which the respondent is made to suffer.

The case of Dougherty differs from that of Nixon in this, that in Dougherty's case the objection to his vote was stated and fully discussed at the polls. The questions raised were :—1st. One of law, namely, whether the nature of his residence upon his father's property which he described was such a residence as came within the meaning of the Act? And 2nd. Whether Dougherty could conscientiously take the oath that he was residing with his father?

Now, the only evidence of the charge of corrupt inducement to Dougherty to take a false oath made against Allen is that given by Dougherty himself, who said that he had several times voted upon the same qualification without objection; that previously to the election in November he had heard his right to vote questioned upon the point raised; that he had given the subject the fullest consideration and had come to the conclusion that his vote was a good one and

that he could conscientiously take the prescribed oath. He also said that at the poll the returning-officer had expressed the same opinion, and had added that at a recent trial of an election petition which had taken place in relation to an election in the same electoral district before the Chancellor, that learned judge had expressed the opinion that precisely such residence as that of Dougherty was sufficient, and that a person upon such evidence could well take the oath. Allen, who is now accused of having corruptly induced Dougherty to take a false oath, also expressed his opinion to be that Dougherty could conscientiously take the oath, and this expression of opinion is the sole foundation for the charge made against Allen.

All that appears to me to be necessary to say upon this charge in addition to what I have said in Nixon's case, as to the nature of the offence pointed at in section 90 of the Act 49 Vic. ch. 8 is that the expression of such opinion by Allen does not appear to me to constitute any inducement made by Allen much less "corruptly" made, in order to get Dougherty to take a false oath.

And as to both of these charges, I am of opinion that if the learned judge who tried that election petition had upon the evidence adduced adjudged either Harrison or Allen to have been guilty of the offence charged against them respectively he would have greatly erred.

Appeal allowed with costs.

Solicitor for appellants: *A. K. Goodman.*

Solicitors for respondent: *McCarthy, Osler, Hoskin & Creelman.*

HALDIMAND.*

DOMINION ELECTION.

BEFORE SIR W. J. RITCHIE, C. J., AND STRONG, TASCHEREAU, GWYNNE AND PATTERSON, JJ.

CHARLES WESLEY COLTER (RESPONDENT IN COURT BELOW)

Appellant.

AND

WILLIAM GLENN (PETITIONER),

Respondent.

ON APPEAL FROM THE JUDGMENT OF MR. JUSTICE
FALCONBRIDGE, SITTING FOR THE TRIAL OF THE
HALDIMAND CONTROVERTED ELECTION.

Controverted election—Bribery by agent—Proof of agency—Proof by conduct.

An election petition charged that H., an agent of the candidate whose election was attacked, corruptly offered and paid \$5 to induce a voter to refrain from voting. The evidence shewed that H. was in the habit of assisting this particular voter, and that being told by the voter that he contemplated going away from home on a visit a few days before the election, and being away on election day, H. promised him \$5 towards paying his expenses. Shortly after the voter went to the house of H. to borrow a coat for his journey, and H.'s brother gave him \$5. He went away and was absent on election day:—

Held, that the offer and payment of the \$5 formed one transaction and constituted a corrupt practice under the Election Act.

At the election in question there was no formal organization of the party supporting the appellant. The County Reform Association had been disbanded and the minutes, regularly kept since 1882, destroyed, as were the rough minutes of every meeting of a convention of the party held since that date. In lieu of local committees vice-presidents were appointed for the respective townships, and on the approach of a contest the vice-presidents called a meeting of the county association, composed

* Reprinted from the Supreme Court Reports.

of all reformers in the riding, to go over the lists and do all the necessary work of the election.

The evidence of H.'s agency relied on by the petitioner was, that he had always been a reformer, had been active for two elections, had attended one important committee meeting and been recognized by the vice-president of the township as an active supporter of the appellant, and that he acted as scrutineer at the polls in the election in question. The trial Judge held that all these elements combined, in view of the state of affairs regarding organization, were sufficient to constitute H. an agent of the appellant. On appeal to the Supreme Court of Canada:—*Held*, Ritchie, C. J., dissenting, and Taschereau, J., hesitating, that the circumstances proved justified the trial Judge in holding the agency of H. established.

APPEAL from the judgment of Mr. Justice FALCONBRIDGE on the trial of an election petition against the return of the appellant as a member of the House of Commons on an election in the county of Haldimand, whereby the appellant was unseated for bribery by an agent.

The election in question was held on January 30th, 1889, and resulted in the return of the appellant. A petition was filed against such return which was tried before Mr. Justice Falconbridge in September, 1889, with the result that the appellant was unseated for bribery committed by one Haslett, his agent. He appealed to the Supreme Court of Canada from such decision.

The appeal was limited to two charges of bribery, numbered 8 and 82 in the petition. It is only necessary refer to No. 82, which was as follows:

“That on or about the day of the election in question, at the township of Walpole, James Haslett, of Walpole, an agent of the respondent, offered and promised to pay, and did pay to Henry Bridges, of the same place, a voter in the said electoral district, the sum of \$5 to induce him, the said Bridges, to refrain from voting in the election at question or to vote thereat for the said respondent.”

The respondent filed a cross-appeal submitting the other charges in the petition which were not passed upon by the trial Judge as grounds for retaining the judgment appealed from.

The following were the circumstances of the act of bribery charged in the petition as above set out: The

voter, Bridges, was a conservative and a neighbour of the alleged briber Haslett who was in the habit of assisting him occasionally with loans and gifts of money and in other ways. A few days before the election he was at Haslett's house, having gone there to borrow a flail, and in conversation with Haslett told him that he contemplated going to Petrolia on a visit for two or three weeks. Haslett then said that if \$5 would be any use to him he could have it. In giving evidence at the trial, Bridges swore that he demurred to taking the money as it might make trouble about the election. This Haslett denied. Shortly after this Bridges again went to Haslett's house to borrow a coat for his journey to Petrolia and while there a younger brother of Haslett gave him \$5. He went to Petrolia and was away on polling day. The trial Judge found that this payment to Bridges was a corrupt act on the part of Haslett.

To show that Haslett was an agent of the reform candidate at this election the petitioner produced evidence of his having been active on behalf of the same candidate at a former election in Haldimand; of his having attended a committee meeting during the election in question in this case and gone over the list of voters; and of his acting as scrutineer at this present election. It was also shown that there was no organization of the reform party in connection with this contest, but that the candidate had addressed a mass meeting of the electors, and stated that he wished them all to do their best to secure his return. This, it was contended, made every reformer in the riding an agent under the Act.

The evidence relating to the conduct of Haslett as given by himself at the trial is as follows :

Q. Your politics, I believe, are pretty well pronounced, are they not?

A. I do not know as they are.

Q. Have you any doubt about your own politics? A. Oh, I have no doubt about it.

Q. Well, why do you cast doubt upon it? A. Well, I never took any very active part in politics.

Q. But which side are you on? A. I am a Reformer.

Q. Always been on the Reform side? A. Yes.

Q. Did you say you never took any active part? A. Well, I did not until these last two elections.

Q. These last two elections you have taken an active part? A. Well, I did not do but very little.

Q. You contrast these two with the former elections. What have you been doing at these two last elections more than you did at the former elections? A. I do not know that I did anything particularly, any more than go out to vote.

Q. But didn't you go out to vote at the former elections? A. Yes.

Q. Well, you did take an active part in the last two elections? A. Very little.

Q. What do you mean by taking an active part? A. Going out and getting in voters.

Q. You then went into the meeting? A. Yes.

Q. And were there how long? A. Perhaps an hour or so.

Q. While the talk was going on about the list? A. Yes.

Q. Did you take any part in it? A. Nothing more than looking at the list and seeing who were the outside men.

Q. Discussing whether they would come and so on? A. Yes.

Q. Did you do any of that? A. No.

Q. Well, what did you do these last two elections? A. Well, this last election I was the agent for Mr. Colter.

He explains in his cross-examination that this was as an agent appointed to attend as a scrutineer at the poll, and again he says: "I am not positive who asked me to act."

Q. Were you appointed at a meeting? A. No, I was not.

Q. Well, if you were not appointed at a meeting you can tell me who asked you to act? Well, I think may be it was Mr. Noble.

Q. And who was Mr. Noble? A. A tailor.

Q. Mr. Noble is the tailor of Jarvis? A. One of the tailors.

Q. What part does Mr. Noble take in politics? A. Well, he was not in our polling division this last election.

Q. James Noble, do you mean? A. Yes.

Q. He is the vice-president, is he? A. Well, I think he is for the township.

Q. Who is the chairman for the polling division? A. I do not know if there is one.

Q. You have been showing some interest in this election? A. Well, I do not know as I took any great interest in it.

Q. Did you canvass any person? A. I did not.

Q. Did you attend any political meetings? A. Yes, I attended political meetings at Jarvis.

Q. How many? A. I was at Mr. Colter's and Dr. Montague's.

Q. Anybody else's? A. No, that is all there were.

Q. Did you attend any private meetings? A. No.

Q. You know what a committee meeting is, do you? A. Yes.

Q. Were you ever at a committee meeting? A. I have been at them.

Q. Where? A. In Jarvis.

Q. And when? A. Well there was a committee meeting before the election.

Q. Where was that held? A. I think it was held in the hotel.

Q. Whose hotel? A. Hanrahan's.

Q. And you attended that? A. Yes.

Q. Did you attend only one meeting? A. I think that is all.

Q. How long was that before the election? A. Probably a couple of weeks.

Q. Who gave you notice to attend that meeting? A. Well, there was nobody gave notice.

Q. How did you know about it? A. Well, we just met one another on the street.

Q. Who was it told you? A. I could not say.

Q. Was it a day meeting or a night meeting? A. Night.

Q. What was done at that meeting? A. Just to look up the outside vote, and see about getting it in.

Q. What else? What about the doubtful vote at home? A. There was nothing particular done about that.

Q. You went over the voters' list, I suppose? A. Yes.

Q. And were doubtful men assigned to different parties to be seen after? A. No.

Q. For what purpose then, did you go over the list? A. Just to kind of see, to have an idea, how many men were outside the county.

Q. That was the particular business? A. Yes.

Q. And how long did the meeting last? A. Perhaps an hour.

Q. And who was the chairman? A. I do not think there was a chairman.

Q. Who was the secretary? A. There was no secretary.

Q. Who had the voters' list? A. I think I had the voters' list.

Q. Who gave you the voters' list? You were the secretary? A. I guess not.

On his cross-examination he says:

Q. You told Mr. McCarthy you had been appointed Mr. Colter's agent in this last election? A. Yes.

Q. In what way, agent for what? A. To act as scrutineer at the polling division of Jarvis.

Q. Is that all you mean? A. Yes.

Q. You mean the appointment in writing, I suppose. A. No, just to check the votes as they came in.

Q. Did you get a written appointment? Or do you remember? A. I do not remember.

Q. Did you see Mr. Colter personally about it? A. No.

Q. Did you see him at all during the campaign, except at the public meetings? A. No.

Q. Have any private talk with him at all? A. Never had a private talk with Mr. Colter.

Q. And you were asked by somebody or other to be scrutineer? A. Yes.

Q. You had once been scrutineer before at a previous election? A. No, I had been appointed but they got some other man in my place and I did not act.

Q. At this time you did act? A. Yes.

Q. As inside scrutineer? A. Yes.

Q. Some party asked you to act? A. Yes.

Q. Mr. Noble asked you to act, and you did act? A. I am not sure whether it was Mr. Noble or not.

Q. Besides this was there any other work that you did at this election? A. No.

Q. How was it you happened to go to this meeting? A. I was just told of it on the street and went.

Q. Then you did not go from your own home intending to go to the meeting? A. No.

The judgment at the trial on the question of Haslett's agency was as follows:

"It remains to consider the question of agency. In dealing with this, regard must be had to the plan adopted by the party supporting Mr. Colter for carrying on the last campaign. Mr. Parker, Dr. Harrison, and other leading reformers stated with some complacency that having discovered at the trial of an election petition in the county in October, 1887, that the conservative organization was superior to theirs they set out to remodel their own system so as to make it at least equal to that of their opponents. To this end they at once after said trial destroyed all the minutes of the county reform association which had been regularly kept since 1882; they immediately after every meeting of a convention and association destroyed the rough minutes of that meeting; and they substituted for the appointment of local committees vice-presidents (generally one for each township) which vice-presidents were named by the townships at meetings of the county association. There was no shibboleth or test for membership of the association, save only sympathizing with the reform cause. The association was supposed to comprehend in its ranks every

reformer within the limits. Conventions are held by the township associations sending delegates."

"When a contest is approaching the vice-president or chairman of the township is instructed to call a meeting of the township association, to go over the lists, to appoint agents at the polls, bring out voters, look after absentees, etc., and the work is carried on by the aid of reformers who choose to assist."

"Shortly what is meant is this:—

"(1.) As to the proceedings of the party as an organization there are to be no records except such as repose in frail human memory. As Mr. Parker puts it, 'so that no information could be got out of me except what I could remember.'"

"(2.) The abolition of local committees was apparently intended to serve a double purpose, viz., to lessen the apparent number of persons for whose acts the candidate might be responsible and to render it more difficult to ascertain afterwards who those persons were."

"It may be that in their avowed desire to improve on the tactics of their opponents, the friends of the respondent have increased instead of diminishing the number of his agents. Certain it is that the law of agency in election matters is so elastic that the Courts will be astute to meet and cope with the ever-increasing ingenuity of some of those who manage election contests."

"The evidence of agency relied on by the petitioner is that Haslett has always been a reformer, has been active for two elections, that he was a scrutineer at the polls, and that he attended one important committee meeting. No one of these elements is perhaps sufficient by itself to constitute Haslett an agent, but all taken together, with the recognition conferred on him by his local chief, Mr. Noble, in view of the state of affairs as regards organization which I have above alluded to, constrain me to hold him to have been agent of the candidate."

"I therefore find that James Haslett, an agent of the respondent, committed the corrupt practice charged, without the knowledge or consent of the respondent."

December 13th and 14th, 1889. *Aylesworth*, for the appellant. The act of Haslett was not a corrupt act under the circumstances proved : *Somerville v. Laflamme*, 2 Can. S. C. R. 216 ; *Windsor Election Case*, 31 L. T. N. S. 135 ; *Kingston Election Case*, Hodgins' El. Cas. 625. A loan to induce a voter to be absent on election day has been held not a corrupt act : *East Elgin Election Case*, 1 Ont. El. Cas. 475.

The agency of Haslett was not proved ; *Berthier Election Case*, 9 Can. S. C. R. 102.

McCarthy, Q. C., for the respondent, cited the judgment of Mr. Justice Patterson in *Muskoka and Parry Sound Case*, 1 Ont. El. Cas. 203 ; *West Simcoe Case*, 1 Ont. El. 159-161 ; *Leigh & Le Marchant*, 4 Ed. p. 75 ; *Mattinson & MacKaskie*, P. 108 ; *Limerick Case*, 1 O'M. & H. 260 ; *Waterford Case*, 2 O'M. & H. 2.

January 22nd, 1890. Sir W. J. RITCHIE, C. J.—Mr. Colter, the appellant, was nominated a candidate at a meeting of delegates selected from different parts of the riding of persons holding reform principles, and accepted the nomination. The regular nomination of candidates took place on the 23rd of January, 1889 ; the polling was on the 30th of January, 1889 ; the trial of this petition was on the 3rd and 10th of September, 1889.

Two charges of corrupt practices by agents were considered by the learned Judge who tried the petition and found to have been established. The first, which we have now to deal with, was alleged to have been by James Haslett to the effect that he offered and promised to pay one Henry Bridges \$5 to induce him to refrain from voting at the said election. I think the petitioner has established that such an offer and payment were made ; that the offer and the payment formed in fact one transaction though the offer and the payment were made at different times ; and that a corrupt practice was thereby committed. The only question then that remains to be determined is as to the agency of Haslett.

This agency should be established beyond all reasonable doubt to the satisfaction of the learned Judge and the burthen of the proof of agency was, in my opinion, clearly on the petitioner. As to the necessity of making a case out beyond all reasonable doubt ample authority is to be found.

In *The Westminster Election Case*, 1 O'M. & H. 95, Mr. Baron Martin says :—

But I think I am justified, when I am about to apply such a law, in requiring to be satisfied beyond all reasonable doubt that the act of bribery was done, and that unless the proof is strong and cogent—I should say very strong and very cogent—it ought not to affect the seat of an honest and well-intentioned man by the act of a third person.

In *The Taunton Case*, 2 O'M. & H. 74, Mr. Justice Grove says :—

To use the language of that eminent Judge, the late Mr. Justice Willes, 'No amount of evidence ought to induce a judicial tribunal to act upon mere suspicion or to imagine the existence of evidence which might have been given by the petitioner, but which he has not thought it to his interest actually to bring forward, and to act upon that evidence and not upon the evidence which really has been brought forward. The second principle, which is more particularly applicable to circumstantial evidence, is this, that the circumstances to establish the affirmative of a proposition, where circumstantial evidence is relied upon, must be all, such of them as are believed, circumstances consistent with the affirmative, and that there must be some one or more circumstances believed by the tribunal, if you are dealing with a criminal case, inconsistent with any reasonable theory of innocence, and when you are dealing with a civil case (otherwise expressed though probably the result is for the most part the same), proving the probability of the affirmative to be so much stronger than that of the negative that a reasonable mind would adopt the affirmative in preference to the negative.'

* * * * *

In *The Sligo Case*, 1 O'M. & H. 301, Mr. Justice Keogh, as to the law of agency, said :—

An observation was made by the counsel for the respondent that the evidence ought to be strong—very strong, clear, and conclusive—of agency before a judge allows himself to attach the penalties of the Corrupt Practices Prevention Act, 1854, to any individual. I agree to that.

As to the nature of the evidence necessary to establish a charge of bribery, Judge O'Brien says in *The Londonderry Case*, 1 O'M. & H. 279.

The charge of bribery, whether by a candidate or his agent, is one which should be established by clear and satisfactory evidence. The consequences resulting from such a charge being established are very serious. In the first place it avoids the election, and in the recent trial of the Warrington election petition, Baron Martin is reported to have said that he agreed with what had been said by Mr. Justice Willes at Lichfield, that before a Judge upset an election, he ought to be satisfied beyond all doubt that the election was altogether void.

Accepting then these cases as truly expounding the law as to the amount of evidence required to sustain charges of bribery and agency, let us consider how far the case has been made out beyond all reasonable doubt.

The learned Judge after stating the plan adopted by the party supporting Mr. Colter for carrying on the campaign, says (see *ante* p. 578) :

The learned Judge thus says it is by combining the three considerations, viz. : the organization of the association, the attendance at the appellant's meeting, and the appointment by the appellant as scrutineer that the agency is made out, and that neither alone would establish it.

Now, as to Haslett's having acted as scrutineer, whether appointed to that position by the appellant, or acting as such at the request of Noble, a vice-president for the township of Walpole, or as one of the electors under section 36 of the Election Act, R. S. C. ch. 8, by no means clearly appears, but assuming that he was duly appointed to and acted in that capacity at the poll in the interests of the appellant, did this constitute him an agent of the appellant generally and make the appellant liable for his acts committed before such appointment? I think not, and I think the learned Judge should not have considered that appointment as an element in determining the question of agency. The appointment of such an agent as provided for by R. S. C. ch. 8, secs. 36 and 38, has clearly reference only to the proceedings on election day, and, therefore, the whole question of agency must turn on the fact of Haslett having attended a so-called committee meeting shortly before this election, probably a couple of weeks, and of being a person

professing reform principles. Would these two establish the agency? As I read the judgment they would not, for the learned Judge says, "It is the combination of the three that does it not the combination of any two." But I think the question of being a reformer must be also eliminated. Colter did not accept the nomination directly from the reformers of Haldimand, for it was abundantly clear that those who nominated Colter were not the body of the reformers of the Riding but a select body of delegates, of whom Haslett was not one, who when appointed were no doubt from, but entirely independent of, the whole body of persons holding the views of the reformers. Having accepted such nomination I cannot think he thereby made all persons in the constituency professing reform principles his agents. In this case it is not necessary to enquire how far or to what extent, if any, he made the members of that convention his agents; it is for the purposes of this case sufficient to say that he did not, apart from them, make all or any of the persons professing reform principles his agents unless he or his agents gave them the authority to act for him or recognized their right to do so by adopting their acts. This leaves then only the attendance at the meeting which the learned Judge admits would not alone be sufficient to establish the agency. Had he not attended this meeting I can see no pretence whatever for the contention that he was an agent of Mr. Colter. It does not appear that this meeting was held at the instance or even with the knowledge of the candidates, or was called by or held at the instance of any person having the charge or management of the election or in any way authorized to call or hold it.

There was no evidence that Haslett canvassed; on the contrary he distinctly swears that he did not; nor is there any evidence that he did any other act directly or indirectly touching the election save and except attending the meeting in question, of which he swears he had only accidentally heard, and going through the

list in order to ascertain who the absent voters were. This is the account he gives of the meeting and he is the only witness that speaks of it. (His Lordship here read the evidence of Haslett, (*ante* p. 576.)

Haslett does not appear to have been in any way entrusted with any duty whatever of managing or influencing the election, or procuring Mr. Colter's return, and he does not appear ever to have spoken to Mr. Colter; in fact he says he never spoke to him. There is not a tittle of evidence that Colter by any act or deed in any way authorized Haslett to act for him or recognized him as his agent directly or indirectly, or ratified or adopted any of his acts. Haslett appears to have been simply a volunteer, not selected by Colter or any person having any authority in connection with the management and conduct of the election, nor does he appear to have been in any way in the counsels of those conducting the election.

I think the cases clearly establish that there must be an appointment as agent or an acting in the business of the election with the knowledge and consent of the candidate or of some person duly authorized to give him power to act in the election or some adoption or ratification of his acts by the candidate or his duly authorized agent, or such an acting in the business of the election with the knowledge of the candidate or his agent from which authority to act can be inferred, all of which appear to me to be entirely wanting in this case.

The Westminster Case, 1 O'M. & H. 92, Mr. Baron Martin :

I have said, and the other Judges have said, that bribing by one of his committee would affect the candidate; but by a 'committee' I meant a number of persons, comparatively few (of course in a county that extends over a considerable district it would be larger), who were entrusted by the candidate with the work of carrying out his election, in whom he put faith and trust, and who, in fact, were his agents for the purpose of carrying it out; but I have never supposed, nor do I believe that either Mr. Justice Blackburn or Mr. Justice Willes ever considered, that where a number of people (600 or 700) choose to call themselves 'a committee' thereupon they become 'agents' of the candidate for the purpose of making him responsible for an illegal act done by one of them. I think

it is a conclusion that could not be borne out by common sense. The committee-man whom I mean, and whom I would hold the respondent to be responsible for, is a committee-man in the ordinary intelligible sense of the word, that is to say, a person in whom faith is put by the candidate, and for whose acts therefore he is responsible.

How can it be said in this case that Haslett was such a committee-man?

In *The Londonderry Case*, 1 O'M. & H. 278, Mr. Justice O'Brien on the question of agency, said :—

It is clear (as held in the Windsor Case) that the employment of a man as messenger is not sufficient to constitute him an agent. Mr. Justice Willes in that case, in those accurate terms for which he is remarkable, said, 'I have stated that authority to canvass—and I purposely used the word authority and not employment, because I meant the observation to apply to persons authorized to canvass, whether paid or not for their services—would, in my opinion, constitute an agent.' I cannot concur in the opinion that any supporter of a candidate who chooses to ask others for their votes and to make speeches in his favour, can force himself upon the candidate as an agent, or that a candidate should be held responsible for the acts of one from whom he actually endeavours to disassociate himself.

In *The Taunton Case*, 2 O'M. & H. 74, Mr. Justice Grove says :—

So far as regards the present case, I am of opinion that to establish agency for which the candidate would be responsible he must be proved, by himself or by his authorized agent, to have employed the persons whose conduct is impugned to act on his behalf, or to have to some extent put himself in their hands, or to have made common cause with them for the purpose of promoting his election. To what extent such relation may be sufficient to fix the candidate must, it seems to me, be a question of degree and evidence to be judged of by the election petition tribunal. Mere non-interference with persons who, feeling interested in the success of the candidate, may act in support of his canvass, is not sufficient in my judgment, to saddle the candidate with any unlawful act of theirs of which the tribunal is satisfied he or his authorized agent is ignorant. It would be vain to attempt an exhaustive definition, and possibly exception may be taken to the approximate limitation which I have endeavoured to express.

In *The Windsor Case*, 2 O'M. & H. 88, the report states that :—

In the course of the case it was proved that one Pantling wrote a letter to a voter named Juniper, who at the time of the election was

away from the borough, offering to pay his travelling expenses if he would come and vote; and it was admitted that this offer, if made by the respondent or an agent of his, would have unseated him. The only evidence of Pantling being an agent was that he was a member of a committee which had been formed for the purpose of promoting the respondent's election. It was not proved who put him on the committee, or how he got there, what his duties were, or what he did; but his own statement as to this was that he understood that his duties were to do the best he could for the respondent.

Mr. Baron Bramwell, in his judgment, said as to this:—

I am invited to believe that in some way or other a man who has given no description of himself, except that he was on a committee, was an agent so that his act in writing this letter should unseat the respondent. It appears to me really impossible to hold that he was an agent. I think that according to the authorities, and according to the good sense of the matter, he was not an agent. He has given us no account of how he came to write this letter to Juniper, he having told him where he had gone to and having told him to write upon the occasion of an election. I cannot help agreeing with Mr. Giffard that if we were to hold this man to be an agent it would make the law of agency as applicable to candidates positively hateful and ludicrous.

The Stroud Case, 3 O'M. & H. 11, Mr. Baron Pigott:—

It is clear that a person is not to be made an agent of the sitting member by his merely acting, that is not enough; he must act in promotion of the election, and he must have authority, as there must be circumstances from which we can infer authority.

Borough of Dungannon, 3 O'M. & H. 101. Baron Fitzgerald:—

I think it must be made out that a party, before he is chargeable as an agent, has been entrusted in some way or other by the candidate with some material part of the business of the election which ordinarily is performed, or is supposed to be performed, by the candidate himself. Whether it has any distinct reference to canvassing or anything of that kind, appears to me to be immaterial, but in some sense or another he must be considered as entrusted by the candidate with the performance of some part of the business of the election, which properly belongs to the candidate himself, though he is unable to perform it in many cases without somebody to aid him. But that entrusting may be made out not merely by an express appointment to the performance of some material duty in reference to the election, but may be made out by implication. The circumstances of each case may differ, but that implication ordinarily must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election. If that part of the business of an election which ordinarily and properly

belongs to the candidate himself be done to the knowledge of the candidate by some other persons, it appears to me that that other person is an agent of the candidate, and the candidate is responsible for any corrupt act done by that person.

How can it be said that anything was done by Haslett was done with the knowledge of Mr. Colter, or that anything was entrusted to Haslett by Colter or by any person authorized to give Haslett authority to act?

Can it be said that the agency has been established in this case beyond all reasonable doubt? The most that can be said, I think, is that there are suspicious circumstances in relation to the bribery, but it is clear that these suspicions will not do.

Under these circumstances I am of opinion the agency was not established, and therefore as to this charge the appeal should be allowed.

STRONG, J.—For the reasons stated by Mr. Justice Falconbridge in giving judgment in the court below on charge No. 82 (which I adopt in their entirety, and to which I have nothing to add) I am of opinion that this appeal should be dismissed with costs.

TASCHEREAU, J.—On that charge 82, “that on or about the day of election in question James Haslett, an agent of the respondent (now appellant), offered and promised to pay and did pay to Henry Brydges, a voter in the same electoral district, the sum of \$5 to induce him, the said Brydges to refrain from voting at the election in question, or to vote thereat for the said respondent (now appellant),” the evidence is conclusive. I need not repeat the facts of the case. They, it seems to me, show a clear and unmistakable act of corrupt practice, and we are, I believe, unanimous on this point.

I have great doubts, however, on the question of Haslett's agency. I am free to say that had I presided at the trial, with the evidence on record, as I read it, I would have hesitated before finding agency. On the other hand, I am impressed here with the grave and obvious reasons

which, in cases of this kind more particularly should restrain an appellate court from interfering with the finding of the Judge at the trial. I have not succeeded yet in bringing my mind to that point of certainty always required to reverse. At the same time, I see the difficulty of finding on this record clear evidence of agency. I cannot say that I have made up my mind one way or the other, and if my conclusions were to affect the result of the judgment I would require more time to consider the point. But as a majority of the court have come to a final determination of the matter it would have been utterly useless for me to delay the judgment, a course I would not, it seems to me, have been justified in taking in a case of this nature, where public interests require a judgment as speedily as possible.

GWYNNE, J.—The questions in this case are purely questions of fact and I cannot say that the conclusions upon them, which have been arrived at by the learned Judge who tried the election petition, are clearly erroneous. I cannot say that the evidence clearly does not justify the conclusion that the organization of the reform association in the county of Haldimand, as detailed in the evidence, (and of which organization the appellant was an approving member, and whose nomination as a candidate, which was offered to him by a convention of the association in pursuance of the scheme of organization, he accepted, was devised for the purpose of giving to a candidate brought forward by a convention of the association the benefits of the organization as a general committee of the candidate without exposing him to the risk attending his nomination of committee-men to manage and conduct the election for him. Nor can I say that the evidence clearly does not justify the conclusion that the attendance by James Haslett at the committee meeting held at Hanrahan's hotel was an act done by him in perfect accordance with the scheme of organization, and in pur-

suance of it in the character of a committee-man acting in the interest of and as an agent of the candidate, just as if he had been appointed by the candidate himself. If these conclusions do not appear to my mind to be clearly erroneous I must adhere to the rule laid down by this Court, and acted upon in several cases, and among these in the *Bellechasse Election Case*, 5 Can. S. C. R. 91, and decline to interfere and to reverse as beyond all doubt erroneous the judgment of the learned Judge who tried the case upon mere questions of fact. I entirely concur in the observation of the learned Judge, to the effect that the Courts should be astute to meet and cope with the ever-increasing ingenuity of those who manage election contests. This timely suggestion thus thrown out appears to me to be a mild criticism by no means inappropriate to the evidence given in this case, as to the origin, the object and the *modus operandi* of the organization in the county of Haldimand. The appeal must, in my opinion, be dismissed with costs, and the result communicated in the ordinary way to the Speaker of the House of Commons.

PATTERSON, J.—The decision that the act of bribery which constituted charge 82 was committed by Haslett was so amply sustained by the reported evidence that, after hearing from Mr. Aylesworth all that could be urged against the view taken by the learned Judge we did not think it necessary to hear Mr. McCarthy on that subject.

On the question as to Haslett's agency there is more to be said on both sides, but no sufficient reason has, in my judgment been shewn for interfering with the finding of the learned Judge who presided at the trial and who heard and saw the witnesses.

The rule which will be found a safe one to bear in mind in approaching a question of election agency was well stated many years ago by Mr. Justice Grove in the *Wakefield Case*, 2 O'M. & H. 100, in language which has lost none of its force, and is still applicable to contests

like the present. After speaking of the impossibility of laying down such definitions and limits as shall meet every case he said:

It is therefore well that it should be understood that it rests with the Judge, not misapplying or straining the law, but applying the principles of the law to changed states of facts, to form his opinion as to whether there has or has not been what constitutes agency in these election matters. It is well that the public should know that they cannot evade the difficulty by merely getting as they suppose, out of the technical meaning of certain words and phrases.

Many reported cases illustrate the application of the general principles referred to widely differing states of facts, cases found in the English reports and in those of our own provinces, as well as some which have been before this Court. It would not serve any useful purpose to refer to them in detail, while to do so might perhaps tend to suggest the erroneous idea that the doctrine was in some way limited to facts like those on which the decisions turned.

This caution may not be unnecessary, especially when English cases are referred to. The principles acted on in those cases will be found to be wide enough and elastic enough to reach every variety of facts, yet under the system on which elections are conducted in this country facts may exist, and may be expected to exist, differing from those found in England much more than the facts of one English case will ordinarily differ from those in another English case. This difference is notably found in the relation of a candidate to his constituency, the mode of selecting the candidate, and the machinery for conducting the contest.

I have had occasion more than once to discuss the subject of election agency and to act upon my opinion. Among other cases there are three reported in the first volume of the Ontario Election Cases. I refer to portions of the judgments delivered by me in the *Prescott Case*, 1 Ont. El. Cas. 93-98; the *West Simcoe Case*, 1 Ont. El. Cas. 146-8; the *Muskoka Case*, 1 Ont. El. Cas. 202-6; repeating

the caution that I do so for the enunciation of general principles, and not because of the facts appearing to be like those now before us, and referring to the reports in place of repeating what I then said.

When an election is approaching, the custom in the county of Haldimand is shown to be for a convention of the reform association of the county to nominate a candidate.

Mr. Colter, the present appellant, was nominated for the election now in question, as he had been on more than one previous occasion, and he accepted the nomination.

There was, as there of necessity must have been, some understanding as to the mode in which the contest was to be carried on. Work had to be done. That is shown by the evidence, though proof of the fact was hardly needed. Who was to do the work? Was the candidate to do it himself personally, or did he rely on the aid of others? The understanding on the subject may have been expressed or have been tacit. These contests were no new things in the county. The association had been in operation for a number of years, and unless a change in the way of doing things was intended the plan of campaign would not be likely to be talked over at every nomination. The *modus operandi* was already established and sufficiently understood.

Mr. Parker, the secretary of the association, gives information as to the general character of the work to be done and the very active part taken by himself, not taken, as he tells us, by reason of any consultation with Mr. Colter or with other leading men, though he had frequent communication with Colter who would enquire how he was getting on, and so forth. He was asked:

Q. What part was Mr. Colter taking in the contest? A. Conducting his meetings, I suppose; I never attended any of his meetings.

Q. You were seeing to the organization of the portion of the riding that you have spoken of? A. Yes.

Q. Then Mr. Colter, so far as you know, was attending the public meetings. And was he also looking after the organization? A. Not that I know of.

Q. Did he say that to you? A. No. I suppose he would get some person else to attend to the other portion of the riding, to do the work I was doing in the part I attended to.

There is abundant evidence, apart from the necessity of the case, that many persons must have been relied on by the candidate to do the work of seeing to get voters out and whatever else an organized canvass required. These persons, whoever they were, must be held to be the agents of the candidate.

Work had to be done. No means, apart from the organization of the association, were provided for doing it. The candidate was not doing it himself.

Mr. Colter was himself an active member of the association for six or seven years preceding 1886. Then he was nominated as candidate and went through two elections before the one now in contest under the auspices of the association. He was, therefore, familiar with the way in which things were done. The organization included local associations. There was one for the township of Walpole, which is the scene of charge 82. The associations comprise all the reformers of the locality, though only a few of them according to Mr. Parker, usually take an active part.

Haslett had been active at the last two elections, though he modestly says he did but very little. That little, he says, was going out and getting in voters.

He afterwards said that it was only at the last election that he took an active part. One thing which he did was to attend a meeting held one night in the village where he lives.

Q. How long was that before the election? A. Probably a couple of weeks.

Q. Who gave you notice to attend that meeting? A. Well, there was nobody gave notice.

Q. How did you know about it? A. Well, we just met one another on the street.

Q. Who was it told you? A. I could not say.

Q. Was it a day meeting or a night meeting? A. Night.

Q. And was that the meeting when the affairs of the polling subdivision were arranged? A. No.

Q. What was done at that meeting? A. Just to look up the outside vote and seeing about getting it in.

Q. What else? What about the doubtful vote at home? A. There was nothing particular done about that.

Q. You went over the voters' list, I suppose? A. Yes.

Q. And were doubtful men assigned to different parties to be seen after? A. No.

Q. For what purpose, then, did you go over the list? A. Just to kind of see; have an idea how many men were outside the county.

Q. That was the particular business? A. Yes.

Q. How long did the meeting last? A. Perhaps an hour.

Q. And who was the chairman? A. I do not think there was a chairman.

Q. Who was the secretary? A. There was no secretary.

Q. Who had the voters' list? A. I think I had the voters' list.

Some interest and activity are implied by the incident of his being provided with the voters' list, which was of some use for the purposes of the meeting.

These questions and answers of Haslett have been pressed on the part of the appellant as proving that, a meeting having been called by some one, Haslett casually heard of it, and that his being there was so casual and unpremeditated as to have no significance on the question of his position in relation to the organized work of the election. It is possible that that is what the witness meant to convey by his answers, but it is not what he said. If we take the answers literally as reported to us, they are consistent with the notion that Haslett may himself have arranged for the meeting and invited his neighbours, and that notion would not be discredited by the circumstance that Haslett was the man who had the voters' list at the meeting.

The want of written or formal notices of the meeting does not strike me as a circumstances of any importance as an indication of Haslett having heard only by chance of this meeting, particularly when it is remembered that the policy of the association, in which the tactics of another association on a different side of politics are said to have been adopted, was to have no written evidence to produce on an election trial. Obviously there

was some sufficient notice to bring the men together whether Haslett gave the notice or received it. The evidence as we have it certainly does not, to my mind, account for his presence at the meeting in any way which weakens the effect, whatever the effect should properly be, of the fact of his attending the meeting with his voters' list and assisting at the business for which the meeting was convened.

It is not my purpose to go at greater length into an examination of the evidence, though I have not failed to consider it with care, because I do not understand it to be the duty of the Court to deal with it as if trying the fact as a Court of first instance. We have not to disturb the finding of the trial Judge unless satisfied that his finding is wrong. It rested with him, as said by Mr. Justice Grove in the passage I have quoted, to form his opinion as to whether there had or had not been in the case of Haslett what constitutes election agency. I see no reason to impute to him, in connection with that enquiry, any misapplication or straining of the law of election agency, nor can I say he arrived at a wrong decision on the facts, although on the same evidence all persons might not arrive at the same conclusion.

In the short reference I have made to the evidence I have touched but slightly upon the fact, which to my mind is an important one and which distinguishes most elections in this country from most of those in England, that the candidate makes no provision for doing many things which we know from common knowledge must be done. The election is in fact less the business of the candidate than of the party organization by which he is nominated.

Nor have I placed any stress upon the appointment of Haslett as scrutineer at the last election. That, by itself occurring as it did after the act of bribery, would not prove agency at an earlier period, or agency for any other purpose than the purpose specified in his appointment. At the same time it is a fact that may

fairly be considered in connection with any part he may have taken in the election work. I mean work of a systematic kind, such as meeting to go over the voters' lists or the like, not merely advocating the candidate or the cause, like the person whose agency was in question in the *Prescott Case*, 1 Ont. El. Cas. 95 *et seq.*, to which I have already referred.

It is urged that the extension (as it is called) of the scope of election agency to include persons like Haslett exposes candidates to risk to an unreasonable extent. The result, if it follows, seems to be due to the footing upon which party organizations have placed these matters. I have nothing to do with the merits or defects of the system as a method of collecting the suffrages of the constituencies. It is not my province to discuss it from the standpoint of either logic or politics. What I am concerned with is to ascertain whether a person convicted of committing a corrupt act in the interest of a candidate has been properly held to come within the description of agent for the candidate. If I find that a candidate who takes the field as the nominee of a party that acts through an organized association, whether the organization is strict and formal, or loose and elastic, depends upon the efforts of the association to promote his election, or relies upon such efforts, I must, as I understand the principles of the law, hold all persons accredited by the association to be the agents of the candidate. Whether a particular individual does or does not come within the description is a question of fact.

I cannot say that I am impressed by the suggested danger of hardship to candidates or constituencies of letting the validity of an election be imperilled by the conduct of any one of so many people as may be election agents in a case like the present. The danger to the purity of election at which our legislation aims from holding a candidate free from risk from the corrupt acts of those on whom he

relies for the conduct of his election, seems to be at least as great and as worthy of being guarded against.

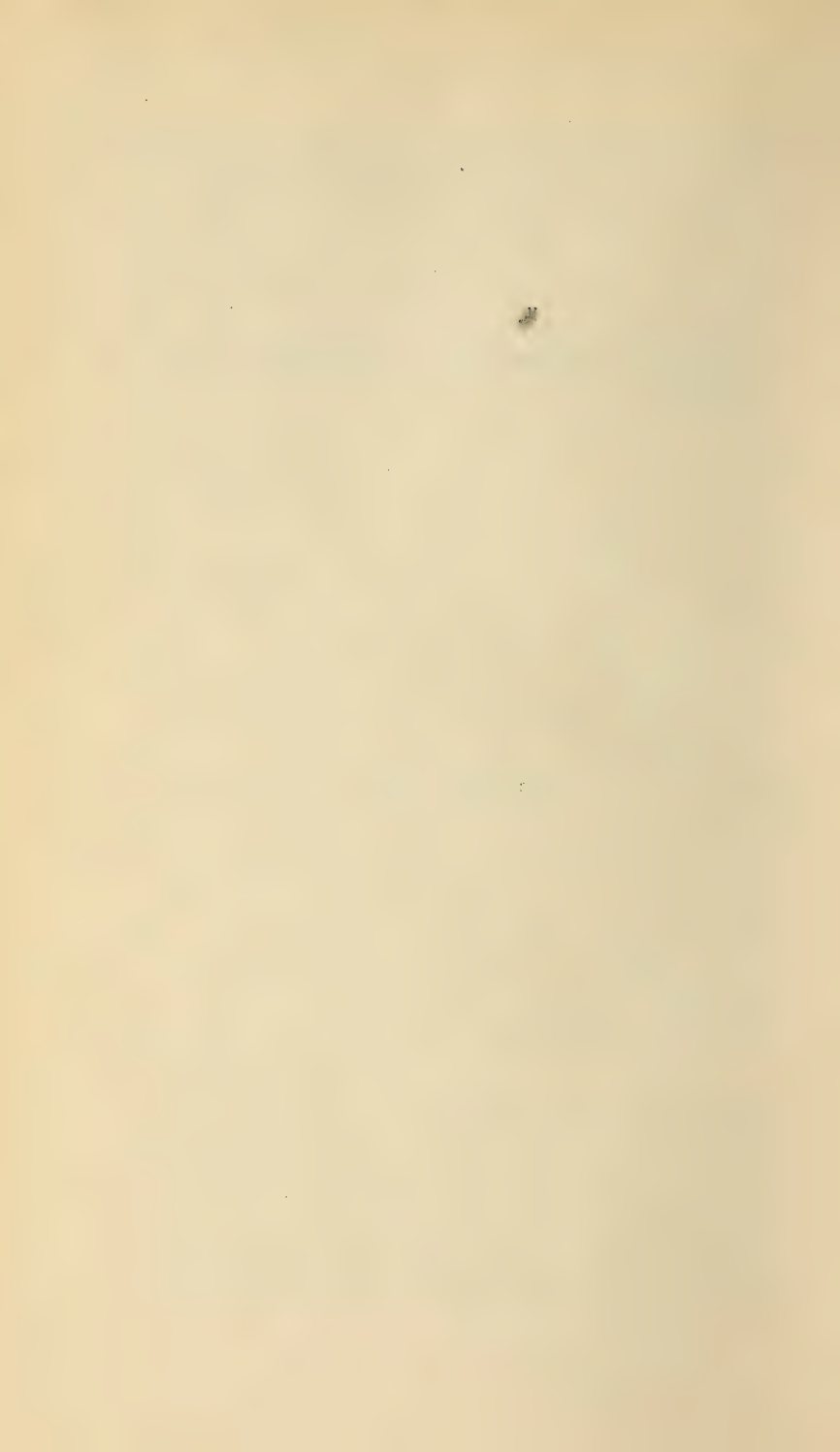
I agree that we should dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for appellant : *A. K. Goodman.*

Solicitors for respondents : *McCarthy, Osler, Hoskin & Creelman.*

END OF VOL. I.



APPENDIX TO ELECTION CASES VOL. I.

HALDIMAND CASE.

The following is a translation into English of the judgment of FOURNIER, J., in the *Haldimand Case*, beginning at p. 549.

FOURNIER, J.—The petition complaining of the election of the respondent contains the ordinary allegations of corruption, and alleges besides that ballots have been admitted and rejected illegally, as well as many other irregularities, and asks for the avoidance of the election. Of the thirty-nine charges of corrupt practices contained in the particulars, the inquiry has proceeded in a great number of cases, and has been abandoned in several others. The respondent had given notice that he would proceed to the proof of recriminatory charges. But the petition having been entirely rejected, he did not find it necessary to proceed with these charges.

Among the charges dismissed by the Honourable Mr. Justice Street, who presided at the trial, and as to which the appeal is taken, is the eighth, which is set forth in the following terms :

8. Frederick Harrison, a resident of the township of Walpole, an agent of the respondent, did, at polling station number six, in the township of Walpole, induce Thomas Nixon, a resident of the township of Walpole, to take a false oath at the poll and to vote at the said election, although not qualified to do so.

The proof of this charge afforded by the evidence of Thomas Nixon, the voter himself, and of William Parker, the agent of the other candidate, W. Colter, is so complete that it leaves no doubt of the existence of the fact charged.

Nixon having presented himself to vote, Parker, the agent of Colter, requested him to take the oath; he

expostulated, but the demand having been reiterated, he turned and walked towards the door of the polling-place. Changing his mind suddenly, he returned and complained again of the agent exacting from him the oath of qualification. The agent Parker still insisting, the deputy returning-officer began to read the form of oath of qualification for voters registered on the list as farmers' sons. Nixon still hesitated, when Harrison, the agent of the sitting member, half rising, interrupted the returning-officer and said to the voter :—" Your vote is perfectly good Tom ; take the oath, Tom, take the oath ; I will be responsible."

Immediately after these words, Nixon took the oath required, and voted. The same facts are also proved by William Parker, in the most positive manner. In his evidence Nixon said, speaking of the intervention of Harrison, that the latter, in view of the objection to his vote, insisted on his taking the oath :—" Harrison insisted that I should take the oath. He said my vote was perfectly good. That was all ; I took his word, and went and voted."

The oath taken by Nixon is that in the form T., applicable to farmers' sons, ending with the declaration :—" That I am a resident with my father within this electoral district, and that I have not been absent from such residence more than six months since I was placed on the list of voters," etc., etc.

The agency of Harrison is proved. He had been specially appointed in writing to represent the respondent at this poll. It was his duty to protect the interests of the respondent by resisting unfounded objections which might hinder voters from giving their votes in favour of his candidate. But the objection which had been taken against Nixon was well founded. Placed upon the list of voters as a farmer's son, living with his father, he had, long before the occasion of his voting, lost his qualification as a voter by the death of his father. He had also left the property upon which he had been qualified when he lived with his father, and had gone to live with one of his sisters upon another property. He was registered as a voter only in

the character of a farmer's son, in no other character, and upon no other list. It was in that character that he voted. The oath which he took that he was resident in the electoral district with his father was evidently false and altogether contrary to the truth. He himself in his evidence gives the date of the death of his father as the 4th of April, 1886. His mother had been dead about ten years. It was not without much hesitation that he took the oath, as we have seen by his own account of what took place. Had it not been for the insistence of Harrison, it is clear that he would have gone away without voting. His hesitation is easy to understand; doubtless it was most repugnant to him to make an oath that he resided with his father, then nineteen months dead. But pressed by Harrison, his neighbour, who knew as well as he did of the death of his father, and who, judging from his manner of addressing him, seems to have been on intimate terms with him, he ended by allowing himself to be persuaded that there was no harm in taking this oath; quite probably he believed that his conscience was discharged from all responsibility by the persuasive tone and the persistence of Harrison in repeating to him that his vote was good, and in telling him to vote—that he (Harrison) would take all the responsibility. Had it not been for the intervention of Harrison, he would without doubt have carried out his first resolve to go away without voting; evidently this vote was obtained solely by the pressure exercised upon Nixon by Harrison. The latter certainly could not have been acting in good faith when he acted thus; he certainly could not have been unaware of the death of Nixon's father, one of whose properties adjoined his own. In any case, since he took upon himself to affirm the validity of the vote, whilst it was clearly illegal, his conduct had the effect of making the respondent answerable for the consequences of his act. If he did not know the true position of Nixon, the son, he should have informed himself of it before speaking with so much confidence as he did. Like so many others, he used more zeal than discretion in the exercise of his func-

tions as agent, and unfortunately his principal has to suffer the consequences.

Harrison has then, with knowledge of the facts, been guilty of the act of inducing Nixon to make a false oath. The offence which he has thus committed is defined as follow by section 90 of the Elections Act, declaring :

That every candidate who corruptly by himself, or by any other person on his behalf, induces or endeavours to induce any person to take any false oath in any matter wherein an oath is required under the Act, is guilty of a misdemeanour.

By the following section, the 91st, it is declared that :

Any wilful offence against any one of the seven sections of this Act next preceding, are corrupt practices within the meaning of this Act.

The act of inducing Nixon to make a false oath is clearly, according to these sections, a corrupt practice committed by an agent of the respondent, and, consequently, has the effect of affecting the legality of the election.

In section 90 the word "corruptly" does not absolutely mean that the act, thus qualified, has been done with an immoral or dishonest purpose, or with malice. The word is used there rather to signify that the act aimed at by that expression is a violation of the prohibition of the statute in that regard (*Cooper v. Slade*, 6 H. L. Cas.). It was not necessary to prove that Harrison, in acting as he did, had a dishonest and immoral intention. At the same time, he has not been put in the witness box to explain on oath his recommendations. Nevertheless, the honourable Judge's opinion was that the intention of Harrison should have been proved, but it is contrary to the interpretation adopted by the following authorities :

All the judges have considered that the word 'corruptly'..... means, with the object and intention of doing that thing which the statute intended to forbid. It does not mean corrupt in the sense in which you may look upon a man as being a knave or a villain.

Per Mr. Justice Blackburn in *The North Norfolk Case*, 1 O'M. & H. 236, at page 242.

And in discussing the meaning of the word in considering whether treating had or had not been done corruptly, Mr. Justice Blackburn says,

“the point to be considered is, Was it given with an intent to influence the election?”

The *Wallingford Case*, 1 O'M. & H. 57, at p. 59.

The word ‘corruptly’ means contrary to the intention of this Act, with a motive or intention by means of it to produce an effect upon the election.

Per Mr. Justice Blackburn in *The Hereford Case*, 1 O'M. & H. at p. 195.

This language is quoted with approval by Mr. Justice Mellor in *The Launceston Case*, 2 O'M. & H. 129, at p. 133.

And by Mr. Baron Dowse in *The Carrickfergus Case*, 3 O'M. & H. at p. 91.

See also, on the same subject, *The Louth Case*, 3 O'M. & H. 161.

Harrison knew perfectly well the objection made to Nixon; he had heard Parker demand that the oath should be administered according to form T. appropriate to farmers' sons; he had been a witness of Nixon's hesitation; but his fear of losing a vote for the respondent so mastered him that he exercised all the pressure of which he was capable upon this young man to induce him to take a false oath. Not only had Harrison the intention of insuring a vote to his candidate, but he persistently applied himself to obtaining it, and obtained it by means of a false oath. It is useless to say more to prove that Harrison's act was done voluntarily and not by inadvertence. He shewed his desire often enough, and owed his success only to his repeated efforts. Whatever motives may be attributed to him, his act was at least *wilful* in the sense of intentional, as it has been interpreted by this Court in the *Selkirk Election Case*, *Young v. Smith*, 4 S. C. R. 494.

I am therefore of opinion that for this single act of Harrison the election should be avoided and the appeal allowed with costs.

A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME
BEING DECISIONS IN
ELECTION CASES.

AFFIDAVITS.

See PLEADING, 2.

AGENCY.

1. *Evidence of agency—Non-member attending local committee meeting—Driving voters to polls—Volunteer.*—S. was a man who always took an active part in every election on the Reform side, and during this election he had, on one occasion, attended a meeting of the local political organization or committee for whose acts in the management of the election the respondent would be answerable, when some election work was done; but it was not shewn that he had canvassed, except in this particular case, or that he was a member of the committee, and he swore that he was not asked to do any work. On the polling day he was actively engaged in driving voters to the polls in his own conveyance, which he said he did as a mere volunteer:—

Held, that S.'s agency was not proved. *North Ontario* (Provincial), 1.

2. *Personal enemy of candidate taking interest in election—Bribery—Evidence—Treachery.*—L., being a municipal councillor, and as such a member of an association which had brought out the respondent as a candidate for election, had a personal disagreement with the respondent, and refused to attend the meeting of the nominating committee when the respondent received the nomination, and when asked by the respondent to support him refused so to do, saying that he now had an opportunity of getting even with him; but without the knowledge of the respondent, he took an interest in the election and bribed a voter.

Held, that he was not an agent of the respondent, and that there was evidence tending to shew that he was acting treacherously towards him. *Lennox* (Provincial), 41.

3. *Evidence of agency—Communication with respondent—Volunteer—To establish agency not necessary that candidate should have knowledge of agency or of agent.*—S., who was a political friend and supporter of the respondent, treated a meeting of electors with the know-

ledge, though not with the direct assent, of the respondent. It was proved at the trial that S. was a noisy, talkative man, employed as a travelling agent through the country; he had a bet or bets on the election; the respondent saw him at the meeting, and had some conversation with him in the crowd. Some time during the contest, and later than the date of the meeting, he went to the respondent's office to make some suggestions, and asked his opinion as to the result, as he said some men wanted to bet with him. While there he saw some "campaign literature" on the table, and took some of it away with him, with the assent of the respondent. No evidence was given that he canvassed voters, and the respondent swore that he never gave him express authority to canvass or do any thing for him, and that he was not a man he would employ as an agent.

Held (at the trial and on appeal), that at the time of the meeting S. was nothing more than a volunteer, for whose acts the candidate was not responsible.

Seemle, where a corrupt act is committed during an election contest by an agent with the knowledge of the candidate, and it turns out that the person committing it was, in fact or in contemplation of the election law, the agent of the candidate, it is not necessary that the candidate should at the time have knowledge that the person committing the act is his agent, or even that he should know such person individually.

The Londonderry Case, 1 O'M. & H. 278, and *The Dungannon Case*, 3 O'M. & H. 101, referred to and followed. *Prescott* (Provincial), 88.

4. *Selling liquor on polling-day—Evidence of agency—Delegate to political convention—Speech by candidate at convention—Implied appointment of delegates as agents—Agent acting quâ agent.*]—The petition charged that one H., as agent of the respondent, in violation of R. S. O. 1877 ch. 10, sec. 157, sold or gave drink at his tavern within the limits of a polling sub-division on polling day, which by R. S. O. 1877 ch. 11, sec. 2, sub-sec. 6, is made a "corrupt practice." It appeared that H. was present and had acted as a delegate at the convention of representative reformers whereat the respondent was nominated. The latter did not undertake a personal canvass, or appoint any particular persons or associations of persons his agents for the purpose of carrying on the contest, but at the said convention he made a speech intimating that he expected his friends to work for him:—

Held, at the trial and by the Court of Appeal (BURTON, J. A., dissenting), that this constituted an appointment by him of every one of those who constituted the convention as his agent for the purpose of the contest, and no proof of acts done by the persons thus addressed and recognized by the candidate, was necessary to establish the agency, and as H. undoubtedly did sell the liquor as alleged, and as this corrupt act was not shewn to be of such trifling nature and extent as to come within R. S. O. 1877 ch. 10, sec. 159, the election must be declared void under sec. 158.

Per PATTERSON, J. A., and FERGUSON, J., (at the trial)—The question of agency is one of fact, and must be decided in every case upon the circumstances immediately in question.

Per SPRAGGE, C. J. O.—When we

find these two things concur, an act that comes within the designation "corrupt practice," and that the doer of the act is an agent for the candidate, we are not at liberty to say that the act was done in order to promote the objects of the agent, and not in order to promote the interest of the candidate; that, though true it is the act of the agent, it is not the act of the agent, *quâ* agent. It being an act which is profitable to the doer of the act, and the making of the profit being assumed to be the motive of the doer of the act, cannot dissociate the act from the election.

The Lincoln Case, H. E. C. 391, commented on. *The Harwich Case*, 3 O'M. & H. 69, distinguished.

No formal appointment and no particular words are necessary to constitute agency, and less positive evidence of appointment or recognition and adoption of a delegate to a party convention as an agent is required than in the case of one not a delegate.

Per BURTON, J. A.—Even if H.'s agency generally for canvassing and assisting in the elections were established in this case, he did not stand in the relation of agent in respect of the matter complained of. The only evidence was that he had sold liquor for his own purpose under a mistaken idea that he had a right to do so, and there was nothing whatever to shew that it was done in connection with his character as agent. But in fact the words spoken by the respondent at the convention to the delegates did not constitute them his agents.

Per BURTON, J. A.—It is only for those acts of the agent which are done by him whilst acting or professing to act within the scope of his duties that the candidate is responsible. It is contrary to all principle

to hold any person affected by the act of an agent, unless it is shewn that the act was done in the course of the employment, and within the scope of the authority, although it may be in abuse of it. *West Simcoe* (Provincial), 128.

5. *Appeal by candidate for help from those present at nominating convention—Authorization to canvass covers agency—Absence of repudiation by candidate—Difference between commercial agency and election agency—Evidence of agency—Personal communication and recognition by candidate—Hiring vehicles.*—It appeared that when the candidate accepted the nomination of the convention of the party he intimated to those present, amongst whom was N., that he looked for their active exertions in carrying on the contest.

Held, per PATTERSON, J. A., and FERGUSON, J., that this amounted to an authorization of those present, including N., to canvass and thus to act as agents; for the authorization to canvass covers agency, and, even without any such express declaration, the agency of those persons who were actually attending and taking part in the convention was established in the absence of anything shewing a repudiation or rejection of the offer of services, which is implied by the very fact of their attending and making the nomination.

Agency in election cases differs from agency in ordinary commercial or other transactions of business, inasmuch as in the case of an election the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of any authority expressly given to

him, but which may be directly contrary to the express directions of the person whose agent he is held to be.

One A. had hired teams and taken voters to the polls contrary to R. S. O. 1877 ch. 10, sec. 154, and it was proved that the candidate, being in the village of G., was told that A. was there for the above purposes, and that he went to see A. in his hotel and discussed the election and the probable results, with lists of voters, etc.

Held, per FERGUSON, J., that this was sufficient to prove the agency of A. in the matter.

Held, per PATTERSON, J.A., that this, and other circumstances of the case, established such agency. *Muskoka and Parry Sound* (Provincial), 197.

6. *Hotel-keeper selling liquor on polling-day—Evidence of agency.*]—A charge was that F., a licensed hotel-keeper, about four o'clock on the polling-day, served H. (an agent) and M., a voter, with drinks in his barroom. F. was a member of the reform association, and generally took part in elections. He attended the meeting called for the nomination of the respondent, but he took no active part in it. On the election day he drove electors to the poll, but it did not appear on which side he was voting. The president of the reform association said he did not think that F. worked for the respondent, and understood that he was a friend of the defeated candidate; and H. said he thought he was not working for the respondent.

Per BOYD, C.—The evidence failed to shew that F. was an agent of the respondent.—*Per* CAMERON, J., that it was sufficient to establish such agency.

On appeal, OSLER, J.A., concurred with BOYD, C. The other Judges did not consider the point. *East Simcoe* (Provincial), 291.

7. *Meetings of party association for constituency—Committee meetings—Membership—Authority—Recognition—Corrupt practices.*]—A reform association existed in the constituency as an organized body for bringing forward candidates and doing everything in their power to elect their nominees. B. was present at meetings of the association, and one witness swore, "he took as much part as any of us." It was not shewn that the organization was well defined, or what was necessary to constitute membership. A committee and sub-committees were appointed for the township in which B. resided, but he was not on them, or any committee for election purposes. Committee meetings were held at his hotel at which he was present, but it was not shewn that he did any more at the meetings than any owner of an hotel would do at a meeting held in his house. B. swore that, with the exception of one man, he did no canvassing outside his own house; he did not report to the committee meetings in his house, because he had been doing nothing, but he gave the respondent the name of one person who wished to see him. It was not shewn that he had any authority from the respondent, or any committee, or that the respondent expected his assistance, or gave him any instructions, or recognized any act done by him. At the trial, it was proved that B. had been guilty of a corrupt practice, without the knowledge or consent of the respondent:—

Held, following the *North Ontario Case*, H. E. C. at p. 323, that B.

was not an agent of the respondent.

D. heard of a meeting, went there, and found about half-a-dozen people present going over a voters' list, in which he did not take part. It was not shewn that he had any authority from the respondent, or any committee or association, or any one on his behalf, or that any act he did was recognized. D. was found to have been guilty of corrupt practices without the knowledge or consent of the respondent.

Held, following the *North Ontario Case*, H. E. C. at p. 317, that he was not an agent. *Welland* (Provincial), 383.

8. *Nomination of candidate by political convention—Evidence of agency—Meetings—Canvassing.*—The respondent was nominated by a convention of the conservative party, composed of fifty or seventy-five persons, among whom was R., who was well known as a prominent member of the party, and was on intimate terms with the respondent, both of them being physicians. R. was one of the persons nominated at the convention, but the choice fell on the respondent, who then made a speech of acceptance in which he said he expected his friends to take an interest in the election and to work for him. R. made no systematic canvass, but he asked several people for their votes, was at various informal meetings of voters held in the interest of the respondent, and with the respondent visited the houses of several voters :—

Held, that R. was an agent of the respondent.

F. D. was also at the convention which nominated the respondent, and he and W. D. were among the supporters of the respondent in a par-

ticular locality who held meetings at which the voters' lists were discussed and arrangements were made for looking up doubtful voters :—

Held, that these men were both to be regarded as agents of the respondent. *East Northumberland* (Provincial), 434.

9. *Scrutineer—Illegal acts at polling place.*—A scrutineer appointed for a polling place at an election, under the written authority of a candidate, is an agent for whose illegal acts at the polling place the candidate will be answerable. *Hal-dimand* (Dominion), 529.

10. *Absence of organization of party supporting candidate—Non-existence of political association—Evidence of agency—Activity—Recognition—Attendance at committee meeting—Scrutineer.*—At the election in question there was no formal organization of the party supporting the appellant. The county reform association had been disbanded and the minutes, regularly kept since 1882, destroyed, as were the rough minutes of every meeting of a convention of the party held since that date. In lieu of local committees, vice-presidents were appointed for the respective townships, and on the approach of a contest the vice-presidents called a meeting of the county association, composed of all reformers in the riding, to go over the lists and do all the necessary work of the election.

The evidence of H.'s agency relied on by the petitioner was that he had always been a reformer, had been active for two elections, had attended one important committee meeting, and been recognized by the vice-president of the township as an active supporter of the appellant,

and that he acted as scrutineer at the polls in the election in question.

The trial Judge held that all these elements combined, in view of the state of affairs regarding organization, were sufficient to constitute H. an agent of the appellant.

On appeal to the Supreme Court of Canada :—

Held, RITCHIE, C. J., dissenting, and TASCHEREAU, J., hesitating, that the circumstances proved justified the trial Judge in holding the agency of H. established. *Haldimand* (Dominion), 572.

Valuable present to wife of voter after election—Agency, when terminated.]—See BRIBERY, 2.

See also SAVING CLAUSE, 6.

AGENTS.

Appointment of agent at polling place—Enabling to vote.]—The appointment of a voter as an agent so as to allow him to vote in a division other than his own, and near where he was employed, is not a corrupt practice. *North Ontario* (Provincial), 1.

Alteration of election petition after filing by clerks of agent of petitioner's solicitor—Spoliators, not agents.]—See PETITION.

Chief agent of candidate keeping out of the way at time of trial.]—See SAVING CLAUSE, 4.

ALIENS.

Scheme to induce a number of aliens to vote when not entitled—Knowledge under R. S. O. 1887 ch.

9, sec. 160—Statute partly penal and partly remedial.]—A number (300) of forms of oaths of residence and allegiance were printed and paid for by the association supporting the respondent as part of the election expenses, and some of the respondent's agents actively canvassed a number of foreigners, who were aliens; and, by getting them to swear to these affidavits, and by conversations, induced them to believe that they were thus naturalized, and had the right to vote, and several of them did vote. The evidence did not shew how many were sworn, but 235 unused forms were produced, and the remaining sixty-five were not accounted for :—

Held, that the procuring of these affidavits just before polling day, when the agents knew that no Court would sit in time to complete the naturalization proceedings by that day, was a plan, design, or scheme to induce the aliens to vote for the respondent; that the knowledge referred to in sec. 160, R. S. O. 1887 ch. 9, is not a knowledge of the statute, but a knowledge of the facts disintitling the person to vote; that although that section contains a penalty of \$100, still it is partly penal and partly remedial; that in enforcing the penalty, the person against whom it is inflicted is the only person concerned, and it should be strictly construed; but in ascertaining whether a corrupt practice has been committed the whole constituency has concern, and only the remedial part of the section is invoked; that on the evidence an agent had the knowledge that one of the aliens had no right to vote at the time he induced him to vote. *Hamilton* (Provincial), 499.

ALTERATION OF PETITION.

See PETITION.

AMENDMENT.

Particulars—Substituting charge—New charge covered by petition—Evidence—Notice—Prejudice.]—Before the trial notice was given that if the evidence failed to shew that money was received by the persons named in charge No. 8 for the purpose of influencing voters, as therein stated, an application for an amendment would be made substituting a charge under sections Nos. 11 and 13 of the petition, that those persons were paid for their services, and so were guilty of corrupt practices in voting for the respondent, knowing that they had no right to vote :—

Held, that two agents of the respondent who were paid for their services, knowing the facts and being presumed to have known the law, were each guilty of a corrupt practice when they voted for him ; and that the amendment as to them should be allowed, as it was really giving particulars under paragraph 13 of the petition, and could be made without any amendment of the petition, and that the evidence sustained it, and as notice had been given the respondent was not prejudiced. *Hamilton* (Provincial), 499.

Refusal by trial Judges to amend particulars—Discretion—Non-interference by appellate Court.]—*See* APPEAL, 2.

See also COSTS, 2 — PETITION — PLEADING, 2.

ANTECEDENT PROMISE.

See BRIBERY, 2—TRAVELLING EXPENSES, 4.

APPEAL.

1. *Finding of trial Judges as to offer of bribe—Evidence—Non-interference by appellate Court.*]—At the trial it was found on a review of the evidence that an offer to bribe, which had not been carried out, was not proved :—

Held, on appeal, that the finding of the trial Judges should not be disturbed unless the Court above was convinced that it was wrong, and that if no more could be said than that the evidence might have warranted a different conclusion, it should not be interfered with. *Prescott* (Provincial), 88.

2. *Amendment of particulars refused by trial Judges—Discretion—Non-interference by appellate Court.*]—The Court of Appeal declined to interfere with the discretion of the trial Judges refusing leave to amend the particulars.

Held, that, where a motion is made which depends on the discretion of the Judge, the Court will not, as a rule, review the exercise of such discretion. *South Victoria* (Provincial), 182.

3. *Refusal of trial Judges to award seat to defeated candidate—Non-interference by appellate Court.*]—At the nomination a protest was handed to the returning-officer, signed by the defeated candidate and three electors, claiming that the respondent was disqualified, and that the opposing candidate was entitled to the seat. Notice thereof was posted at some of the polls, and some electors were told of it :—

Held, on the evidence, the trial Judges having refused to award the seat to the defeated candidate, that the Court in appeal would not interfere. *South Renfrew* (Provincial), 359.

4. *R. S. O. 1877 ch. 10, secs. 174, 175—Summary trial of persons guilty of corrupt practices at elections—No appeal from decision of Court—R. S. O. 1877 ch. 11, secs. 63 et seq., not applicable.*—The right of appeal given under section 63 and following sections of the Controverted Elections Act, R. S. O. 1877 ch. 11, does not extend to decisions either of the Judge or Judges for the trial of the petitions or other Judges sitting as a Court for the trial of corrupt practices under sections 174 and 175 of the Election Act, R. S. O. 1877 ch. 10, and amendment.

Observations upon anomalies and difficulties in the procedure. *Lennox* (Provincial), 422.

Finding of trial Judge—Rejected ballot papers—Non-interference by appellate Court.—See **BALLOT**, 2.

Disagreement of trial Judges—Position of case before Court of Appeal.—See **DISAGREEMENT OF TRIAL JUDGES**.

Power of saving election under R. S. O. 1877 ch. 10, sec. 159, to be cautiously exercised by appellate Court.—See **SAVING CLAUSE**, 3.

BALLOT.

1. *Secrecy of ballot—Illiterate voters—Duties of deputy returning-officer as to—Marking ballot paper in presence of other persons.*—A deputy returning-officer in polling

the votes of some fifty illiterate voters, instead of taking from each a declaration "that he was unable to read," asked each if he was able to read or write, and having received an answer in the negative, requested him to put his mark to the declaration of illiteracy, explaining what he conceived to be its effect thus, "You hereby sign that you are unable to read or write sufficiently to mark your ballot paper." He then openly marked the ballot paper as instructed by the voter, in the presence of both candidates, their agents, and the poll clerk, all of whom had taken the usual declaration of secrecy. One witness also said the constable was in the room.

Held (at the trial and on appeal), that substantially there was no violation of the principle of secret voting laid down in the Act R. S. O. 1877 ch. 10, and that the votes were not improperly taken.

Per OSLER, J. A.—There is nothing in the Act which makes it necessary that the deputy returning-officer should withdraw with the agents of the candidates and the voter to another room, or which forbids the poll clerk or other persons lawfully present in the polling booth from remaining there while the voter announces for whom he wishes to vote.

Per SPRAGGE, C. J. O.—The illiterate voters were not misled, but the conduct of the deputy returning-officer was perverse. The manifest policy of the Act is that the voting shall be in all cases as secret as under the circumstances it can be. It was not necessary that more than the three persons named in the Act besides the voter himself should be present: the deputy returning-officer and one representative of each candidate. The presence of any others

was not in accordance with the spirit and policy of the Act and should not have been permitted by the deputy returning-officer.

Per BURTON, J. A.—Beyond the slight mistake made by the deputy returning-officer in explaining the declaration, there appears nothing in the course pursued which was not warranted by the Act; there was no one present except the deputy returning-officer, the candidates, their agents, the poll clerk, and the constable, all of whom had taken the oath of secrecy, except the constable, who was in another part of the room. *Prescott* (Provincial), 88.

2. *Secrecy of ballot—Public policy—R. S. C. ch. 9, sec. 71—Rejected ballot papers—Finding of trial Judge—Non-interference by appellate Court.*—Secrecy of the ballot is an absolute rule of public policy and it cannot be waived: sec. 71 of ch. 9, R. S. C.

On this appeal certain ballot papers being objected to:—

Held, that it will require a clear case to reverse the decision of the trial Judge who has found as a question of fact whether there was or was not evidence that the slight pencil marks or dots objected to had been made designedly by the voter. Also, that where the x is not unmistakably above or below the line separating the names of the candidates the ballot is bad. *Haldimand* (Dominion), 529.

See TENDERED BALLOT.

BALLOT PAPERS.

See BALLOT, 1, 2—IRREGULARITIES AT ELECTION.

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BETTING.

Bet that a voter would not vote—Evidence.—R., an agent of the respondent, made a bet with P. that P. would not vote. R. swore that he made the bet not with any intention of influencing P.'s vote, which he knew such a bet would not do, but as a sporting bet made on the spur of the moment, with the expectation that, as he said, P. would warm up and vote; while P. swore that the \$5 would not have prevented his voting if he intended to do so, and that he had made up his mind not to vote before the bet was made.

Held, that this was not a corrupt act. *West Northumberland* (Dominion), 32.

(Reversed in Supreme Court of Canada.)

BRIBERY.

1. *Payment to messenger—Colourable payment.*—A payment of \$10 was made to P. H. to go some miles for voters, although another messenger was sent and paid by another agent for the same purpose, who failed to get through on account of the roads, and returned the money:—

Held, that there was no reason to suppose that the money was paid colourably. *North Ontario* (Provincial), 1.

2. *Promise to wife of voter—Valuable present after election—Corrupt practice—Agency, when terminated.*—P., an agent of the respondent, on the morning of the election called on the wife of one K. and asked her to use her influence with her husband to induce him to vote for the respondent, saying, "I will make it all right." She told her husband, who

laughed and replied that he intended to vote for the respondent any way, or that he would do as he liked; and he did vote. After the election the wife called at P.'s store, and having reminded him of his promise, she went into the grocery department and got goods to the value of \$4.49. Subsequently an account was rendered including this \$4.49, and her husband objected to pay it. She then told a clerk of P.'s that that part of the account was "settled off election time," and a new account was subsequently rendered by the attorney for the estate, as P. had failed in the meantime, with that item omitted.

Per BURTON, J. A.—The words of the promise in themselves alone did not amount to "an offer or promise of money or other valuable consideration," but being followed *after* the election by the present of goods, the gift was made in pursuance of the promise, and therefore corruptly; but as P.'s agency had terminated with the election, it was not such a corrupt practice as to affect the candidate unless done with his privity and assent.

Per OSLER, J. A.—P. intended to convey and did convey to the wife the idea that if she procured or would induce her husband to vote as he wished, she would receive *something of value*; the giving of the groceries after the election was an act of bribery, and if it stood alone it would have been necessary to carry the evidence of agency further, but following the promise it showed what both parties understood, and to that extent the respondent was affected by what was done after the election. *North Ontario* (Provincial), 1.

3. *Equivocal act—Innocent construction to be preferred—Evidence—*

Treating—Payment of \$2 after close of poll—Payment of \$50 after election to enable voter to go away.]—When an act or expression is equivocal, and may in one aspect denote something wrong or criminal, and in another aspect be quite innocent, the latter should be adopted as denoting the true meaning of the expression or tendency of the act, unless the surrounding circumstances repel its adoption.

The corrupt acts alleged in this case were the treating of B., a voter, by the respondent's agent H. by giving him a glass of whiskey and two sums of money, \$2 and \$50 respectively. The treating, according to B.'s evidence, was nothing more than an act of good fellowship; and, according to H.'s account, B. was not feeling well, and the whiskey was given in consequence. The \$50 was given B. to induce him to go away in the hope that his absence would prevent proceedings being taken against H. on account of his treating and giving B. the \$2; and not by reason of any previous arrangement between them that B. should receive anything. The \$2 was given on the polling day, but after the close of the poll. B. negatived that it was paid him for his vote, and stated that it was given him to buy whiskey going home; while H. stated that he supposed it was a dollar bill, and told B. to go and treat the boys with it; and that it was not given on account of any previous promise, or for his having voted:—

Held, that none of these acts constituted corrupt acts so as to avoid the election. *West Northumberland* (Dominion), 32.

(Reversed in Supreme Court of Canada.)

4. *R. S. O. 1877 ch. 10, sec. 149*
(a)—*Present to wife of voter—Immaterial whether voter actually voted*

or not.]—Where N., who appeared to have been an agent of a candidate, called upon M., an elector, and, without directly asking him to vote, handed him one of the candidate's cards, and stated that he was going to give M.'s wife a present, but that he could not give M. a present, because it was election time, and that M. could get a present for his wife any day he was in B. (one of the places where voting was to take place); and M. went to B. the night of the election and got the present, which was tea and sugar, etc., worth about \$2 :—

Held (at the trial), per PATTERSON, J. A., and FERGUSON, J., that this came within the acts spoken of in R. S. O. 1877 ch. 10, sec. 149, (a), and that the goods having been given to M. under the idea that he had voted, it was immaterial whether it was proved that M. had actually voted or not. *Muskoka and Parry Sound* (Provincial), 197.

5. *Evidence—Connection of payment of money with vote—Payment of \$4 for one day's work posting bills—Corrupt practices.*]—D., an agent of the respondent, bribed M., a voter, by payment of money. The same D. gave one L., after he had voted, \$1, which both D. and L. said was a loan and not a gift :—

Held, as to the first payment, per BOYD, C., and CAMERON, J., a corrupt practice; as to the latter payment, per BOYD, C., not a corrupt practice, the evidence not connecting the payment with the vote given; per CAMERON, J., that it did.

H., a voter, was paid \$4 by an agent of the respondent for one day's work posting bills :—

Held, per BOYD, C., not a corrupt practice; per CAMERON, J., an unreasonably large payment for the

work done, though not sufficient, if it were the only charge, to avoid the election. *East Middlesex* (Provincial), 250.

Paying canvassers not a corrupt practice.]—See CANVASSERS.

See also AGENCY, 2 — SAVING CLAUSE, 4, 5, 7.

BURDEN OF PROOF.

Corrupt practice proved—Onus as to saving clause.]—See DISQUALIFICATION OF CANDIDATE, 3.

CANDIDATES.

Refusal of trial Judges to award seat to defeated candidate—Non-interference by appellate Court.]—See APPEAL, 3.

Personal expenses of candidate—Return of—Treating by candidate.]—See SAVING CLAUSE, 4.

Candidate treating on same evening as meeting held—Habit of treating.]—See TREATING, 2.

See also DISQUALIFICATION OF CANDIDATE, 1, 2, 3.

CANVASSERS.

Paying canvassers—Corrupt practice.]—Certain persons were paid as canvassers in behalf of the respondent :—

Held, not a corrupt practice. *Lennox* (Provincial), 41.

CANVASSING.

See AGENCY, 8.

CASES.

Dungannon Case, 3 O'M. & H. 101, referred to and followed.]—See AGENCY, 3.

East Simcoe Case, 1 E. C. 291, followed.]—See SAVING CLAUSE, 8.

Harwich Case, 3 O'M. & H. 69, distinguished.]—See AGENCY, 4.

Lincoln Case, H. E. C. 391, commented on.]—See AGENCY, 4.

Londonderry Case, 1 O'M. & H. 278, referred to and followed.]—See AGENCY, 3.

Maude v. Lowley, L. R. 9 C. P. 165, followed.]—See PLEADING, 2.

Monck Case, H. E. C. 154 ; 32 U. C. R. 147, distinguished.]—See PLEADING, 2.

North Ontario Case, H. E. C. at pp. 317, 323, followed.]—See AGENCY, 7.

Prescott Case, 1 E. C. 88, followed.]—See DISQUALIFICATION OF CANDIDATE, 3.

Welland Case, H. E. C. 198, followed.]—See COSTS, 1.

West Simcoe Case, 1 E. C. 153, referred to and followed.]—See SAVING CLAUSE, 7.

CERTIFICATE OF TRIAL JUDGES.

See DISQUALIFICATION OF CANDIDATE, 2.

COMMITTEES.

See AGENCY, 1, 7, 10—MEETINGS, 4.

CONVENTIONS.

See AGENCY, 4, 5.

CORRUPT PRACTICES.

R. S. O. 1877 ch. 10, secs. 174, 175—Summary trial of persons guilty of corrupt practices at elections—No appeal from decision of Court—*R. S. O. 1877 ch. 11, secs. 63 et seq.*, not applicable.]—See APPEAL, 4.

Knowledge of candidate that corrupt practices likely to be committed—Burden of proof.]—See DISQUALIFICATION OF CANDIDATE, 3.

See also AGENCY—AGENTS—ALIENS—AMENDMENT—APPEAL—BETTING—BRIBERY—CANVASSERS—COSTS—DISQUALIFICATION OF CANDIDATE—FARMERS' SONS—HIRING VEHICLES—INTIMIDATION—MEETINGS—PETITION—PLEADING—REFRESHMENTS—SAVING CLAUSE—TRAVELLING EXPENSES—TREATING.

COSTS.

1. *Distribution of costs according to event*—Saving clause, *R. S. O. 1877 ch. 10, sec. 159.*]—Where one corrupt act by an agent was established, but the petition was dismissed by virtue of the saving clause, *R. S. O. 1877 ch. 10, sec. 159* :—

Held, following *The Welland Case*, H. E. C. 198, that the respondent should pay the costs of the petition and trial, but just to the same extent as if the charge of the corrupt act proved had been the only charge upon which the petition was founded; and that the petitioner should pay the costs of the charges upon which he failed. *Prescott* (Provincial), 88.

2. *Distribution of costs according to event—Amendment.*]—Where the election was declared void on account of corrupt acts of agents :—

Held, that the petitioner was entitled to the general costs of the petition and trial, and the respondent to the costs occasioned by the charges in the particulars upon which he had succeeded, and also to whatever expenses had been incurred by him in regard to charges which the Court had decided could not be added by amendment. *West Simcoe* (Provincial), 128.

3. *Irregularities in election.*]—*Held*, per BOYD, C., that all parties should bear their own costs of so much of the petition and trial as related to the irregularities of the returning-officer and deputy returning-officers. *East Simcoe* (Provincial), 291.

4. *Corrupt act of agent proved—Election saved under R. S. O. 1877 ch. 10, sec. 159—“Event”—Apportionment of costs.*]—Where a corrupt act by an agent and certain illegal practices by other persons were proved, but the election was saved under R. S. O. 1877 ch. 10, sec. 159 :—

Held, that although the respondent was duly elected, the costs did not follow this event, but, under section 160, as if the event had been the setting aside of the election ; the respondent paying the general costs, including full costs which would have been taxable if the only charges had been those on which the petitioner had succeeded, the latter being deprived of costs in respect to the charges on which he failed, the respondent bearing his own costs of those charges. *Welland* (Provincial), 383.

5. *Distribution of costs according to event.*]—Where the election was declared void on account of corrupt acts of agents :—

Held, that the general costs of the petition and charges on which the petitioner succeeded should be paid by the respondent as if these were the only charges ; the costs of the charges on which the petitioner failed to be paid by him and set off against the others. *East Northumberland* (Provincial), 434.

COURTS.

Court for summary trial of corrupt practices.]—See APPEAL, 4.

Trial of petition during sittings of Divisional Court.]—See TRIAL OF PETITION, 2.

Order fixing time for trial—Jurisdiction to make—Divisional Court—Single Court.]—See TRIAL OF PETITION, 3.

DELEGATES.

Political convention—Speech by candidate at convention—Implied appointment of delegates as agents.]—See AGENCY, 4.

Appeal by candidate for help from those present at nominating convention—Authorization to canvass covers agency—Absence of repudiation by candidate.]—See AGENCY, 5.

Political convention—Nomination of candidate by—Speech by candidate.]—See AGENCY, 8.

DEPUTY RETURNING-OFFICERS.

Political associations—Recommendations.]—The suggestion of

names and recommendation of deputy returning-officers by political associations commented on and disapproved of. *North Ontario* (Provincial), 1.

See BALLOT, 1—SAVING CLAUSE, 2.

DISAGREEMENT OF TRIAL JUDGES.

Position of case before Court of Appeal.—Where the trial Judges disagreed, and the case was brought before the Court of Appeal:—

Held, per OSLER, J. A., that the whole case was before the Court of Appeal on the evidence, and ought to be disposed of in all respects as on an appeal from the trial Judges. *East Simcoe* (Provincial), 291.

Effect of disagreement of trial Judges at former election trial as to disqualification of candidate.—See DISQUALIFICATION OF CANDIDATE, 1, 2.

DISCRETION.

See APPEAL, 2.

DISQUALIFICATION OF CANDIDATE.

1. *R. S. O. 1877 ch. 10, secs. 154, 161, 162—R. S. O. 1877 ch. 11, sec. 2, sub-sec. 6; sec. 38—Corrupt act at former election—Illegal act—Payment of voters' travelling expenses—Disagreement of trial Judges at former trial—Concurrent finding of trial Judges—Disqualification of candidate as result of former trial—Saving clause sec. 162—Removal of disqualification—47 Vic. ch. 4, sec. 48, (O.), not retrospective.*—At a

provincial election trial before CAMERON, J., and BOYD, C., CAMERON, J., certified that they differed in their judgments as to whether the respondent was guilty of a corrupt practice under section 161 of the Election Act, R. S. O. 1877 ch. 10, in paying or consenting to the payment of the travelling expenses of certain voters to convey them to the poll; and he further certified that the respondent was proved guilty of the said corrupt practice. BOYD, C., also certified as to the difference of opinion, and further certified that the respondent committed an illegal act under section 154 in sanctioning the payment of voters' travelling expenses at the election, but without any corrupt intent, and in ignorance which was involuntary and excusable, under a belief that so long as he did not personally bear or pay the said expenses, it was not illegal, and under the fullest belief that the voters were bound or were willing to repay the said expenses, or allow them to be deducted from their wages:—

Held, by the trial Judges, that under R. S. O. 1877 ch. 11, the Judges must concur in finding that the respondent had been guilty of a "corrupt practice"; and that there was such concurrent finding here; for although the finding of BOYD, C., was that the act was an "illegal act," such illegal act under section 2, sub-section 6, is made a corrupt act; and that the respondent was therefore personally disqualified; and that, as there was not a concurrent finding under the relieving clause, sec. 162, such disqualification was not removed; and that this was not affected by the Act 47 Vic. ch. 4, sec. 48, (O.), as in this respect that Act was not retrospective. *South Renfrew* (Provincial), 70.

2. *R. S. O. 1877 ch. 10, secs. 154, 161, 162—R. S. O. 1877 ch. 11, sec. 2, sub-sec. 6; sec. 38—Corrupt act—Illegal act—Payment of voters' travelling expenses—Disagreement of trial Judges—Concurrent finding of trial Judges—Relieving clause, sec. 162—Disqualification, removal of—Retrospective Act—47 Vic. ch. 4, sec. 48, (O.)—Report of trial Judges—Certificate—Estoppel.*]—A provincial election trial was held in 1883, before CAMERON, J., and BOYD, C., who made separate reports agreeing in voiding the election under *R. S. O. 1877 ch. 10, sec. 161*, by reason of the respondent paying or consenting to the payment of the travelling expenses of certain voters to convey them to the poll; but differing in their judgments as to whether the respondent was guilty thereby of a corrupt practice under *sec. 161*. CAMERON, J., reported that the respondent was proved guilty of said corrupt practice, and BOYD, C., reported that the respondent committed an illegal act under *section 154*, in sanctioning such payment, but without any corrupt intent, and in ignorance, which was involuntary and excusable, under a belief that as long as he did not personally bear or pay the said expenses it was not illegal, and under the fullest belief that the said voters were bound or were willing to repay the said expenses or allow them to be deducted from their wages. A subsequent election took place on 18th January, 1884, when the respondent was elected. A petition was filed attacking his election on the ground of the prior disqualification of the respondent:—

Held, by the Court of Appeal, [PATTERSON, J.A., dissenting] affirming the judgment of the trial Judges, BURTON, J.A., and GALT, J., that the

finding that the respondent was guilty of a corrupt practice was correct; and that he was therefore personally disqualified; and, as there was not a concurrent finding that he came within the relieving clause, *sec. 162*, the disqualification was not removed; and that the amending Act 47 Vic. ch. 4, *sec. 48 (O.)*, which was passed on 25th March, 1884, did not apply to this case.

Per OSLER, J. A.—One joint report of the trial Judges under the hands of both is not essential; but there may be two separate reports, each under the hand of one of the Judges; but

Quære, whether the certificate under *R. S. O. 1877 ch. 11, sec. 65*, of the result of the trial should be joint; this, however, was not now open to the respondent, for, by his becoming a candidate at the subsequent election, he must be taken to have admitted that the former election was on some ground or other regularly set aside. *South Renfrew (Provincial)*, 359.

3. *Corrupt practices—Knowledge of candidate that such practices likely to be committed—Saving clause, R. S. O. 1877 ch. 10, sec. 162—Burden of proof.*]—It appearing that a number of persons visited the district, and that the object of their visit was to influence the electors by corrupt means, and that there was an organized and systematized plan to employ corrupt means to influence and carry the election in various ways, and that the trial Judges were not satisfied that the respondent was ignorant that such practices were likely to be committed by persons acting in his behalf in the conduct of the election, and found that corrupt practices prevailed at the election, and declined to relieve the re-

spondent under R. S. O. 1877 ch. 10, sec. 162, of the penalties incurred by him under sec. 161, the Court of Appeal now declined to interfere with their decision; GALT, J., dissenting.

Per HAGARTY, C.J.O.—When a corrupt practice is proved, the onus is at once shifted to the respondent to bring himself within the saving clause, sec. 162.

The Prescott Election Case, ante p. 88, followed. *Muskoka and Parry Sound* (Provincial), 197.

DIVISIONAL COURT.

See TRIAL OF PETITION, 2, 3.

ESTOPPEL.

See DISQUALIFICATION OF CANDIDATE, 2—IRREGULARITIES AT ELECTION.

EVIDENCE.

See AGENCY, 1, 2, 3, 4, 5, 6, 7, 8, 10 — AMENDMENT — APPEAL, 1 — BETTING—BRIBERY, 1, 2, 3, 5—INTIMIDATION—PLEADING, 3.

FARMERS' SONS.

Scrutineer, agency of—Wilful inducing a voter to take a false oath—Corrupt practice—Qualification of voters—Farmers' sons—Oath T.—Secs. 90 and 91 and secs. 41 and 45 of ch. 8, R. S. C.—Scrutiny.—A scrutineer appointed for a polling place at an election, under the written authority of a candidate, is an agent for whose illegal acts at the polling place the candidate will be answerable.

The insisting by such scrutineer of the taking of the farmers' son's oath T., by a hesitating voter whose vote is objected to, and who is registered on the list as a farmer's son and not as owner, when, as a matter of fact, the voter's father had died previous to the final revision of the list, leaving the son owner of the property, is a wilful inducing or endeavouring to induce the voter to take a false oath so as to amount to a corrupt practice within secs. 90 and 91 of ch. 8, R. S. C., and such corrupt practice will avoid the election under sec. 93; STRONG and GWYNNE, JJ., dissenting.

Per STRONG, J.—That reading sec. 41 in conjunction with sec. 45, sub-sec. 2, and the oath T. in schedule A. of ch. 8, R. S. C., an inquiry on a scrutiny as to the qualification of a farmer's son at the time of voting is admissible, and if it is shewn that a larger number of unqualified farmers' sons' votes than the majority were admitted, the election will be void. *Haldimand* (Dominion), 529.

HIRING VEHICLES.

1. *R. S. O. 1877 ch. 10, secs. 153, 154—Voters or non-voters.*—*Held*, by PATTERSON, J.A., and FERGUSON, J., that what is referred to in R. S. O. 1877 ch. 10, sec. 154, is hiring vehicles to convey persons with the intention of their voting, and the qualification of such persons, or their right to vote, is immaterial, whereas section 153 requires persons therein referred to to be voters. *Muskoka and Parry Sound* (Provincial), 197.

2. *Conveying voters to poll—Livery stable-keepers—Partnership—Corrupt practice—R. S. C. ch. 8,*

secs. 88, 91.]—W., an agent of the respondent, was in partnership as a livery-stable keeper with G. Under an agreement between them if either partner took out carriages for his own use he was to pay his co-partner half hire for them. On election day W. took out carriages of the partnership and conveyed voters to the poll, and afterwards, after the election, duly accounted to G. for half hire for the same :—

Held, that this constituted a corrupt practice under R. S. C. ch. 8, *secs. 88, 91*, being a hiring of carriages to carry voters to the poll, and that the election of the respondent was void. *West Middlesex (Dominion)*, 465.

See AGENCY, 5—TRAVELLING EXPENSES, 1.

HOUSEHOLDERS.

See UNORGANIZED TOWNSHIPS.

HUSBAND AND WIFE.

See BRIBERY, 2, 4.

ILLEGAL PRACTICES.

See SAVING CLAUSE, 2, 6, 7, 8.

ILLITERATE VOTERS.

Secrecy of ballot—Duties of deputy returning-officer as to — Marking ballot paper in presence of other persons.]—*See* BALLOT, 1.

INTIMIDATION.

Servants of company—Evidence—Dismissal of servant.]—C. occupied
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as a boarding-house, a house of a lumber company rent free, and was paid for boarding the men by the men themselves, but through the company retaining the amount thereof out of their wages. C. acted as scrutineer for the defeated candidate, and while so acting, but after he had voted, was sent for by P., the company's manager, an agent of the respondent, and given to understand that his so acting was not satisfactory to the company and against their interests. No threat of any kind was made. C. returned to the polling place and continued to act, but on reflection, about 12 o'clock, he ceased to do so. C. had canvassed the men at the boarding-house for the defeated candidate, for whom some had promised to vote, and a good many of the men had voted before he left. It did not appear that what P. had said to C. was communicated to any voter, or that any voter was influenced thereby:—

Held, that a charge of intimidation was not proved.

After the election C. received notice of dismissal from the company, and was informed by P. that it was for talking too much in the election about one of the hands being sent away to prevent his voting. It was charged that C. was dismissed on account of his having voted at the election :—

Held, that the charge was not proved. *East Simcoe (Provincial)*, 291.

INTOXICATING LIQUORS.

See AGENCY, 4, 6 — REFRESHMENTS—SAVING CLAUSE, 3—TREATING.

IRREGULARITIES AT ELECTION.

Delay in opening poll—Insufficiency of ballot papers—Delay—Omission to take oath of secrecy—Result not affected—Relief under R. S. O. 1877 ch. 10, sec. 197—Holding nomination after time fixed therefor—R. S. O. 1877 ch. 10, sec. 33—Imperative or directory—Estoppel.

(1) At a polling sub-division, through a series of mischances, and without any wilful default of the officials, the poll was not opened till between half-past one and two, whereby it was charged a number of electors were deprived of voting. The petitioner failed to prove the charge, while, if the onus of doing so were on the respondent, he shewed there was ample time to poll all the votes at that sub-division, and that all who desired to vote could have done so; (2) The supply of ballot papers at a polling sub-division, through a blunder of the officials, ran out, and, while waiting for instructions, the poll was closed for half-an-hour, whereby, it was charged, some seventeen voters were prevented from voting; but as a matter of fact none of these voters were prejudiced thereby; (3) The deputy returning-officer and subordinate officers at a polling sub-division, through improvidence, but not *malâ fide*, did not make the declaration of secrecy required by sec. 147 of R. S. O. 1877 ch. 10; but the result was not affected thereby:—

Held, by the trial Judges, BOYD, C., and CAMERON, J., that as these grounds of irregularity did not *per se* affect the result, they came within the protection of sec. 197, and did not avoid the election.

Under sec. 33 the returning-officer is to fix the place and time of nomination, such time to be between

eleven a.m. and two p.m. of the day fixed therefor. The returning-officer, who lived at B., owing to inevitable accident arising from the train being blocked with snow, did not reach O., the place of nomination, till two p.m., and the hustings until ten minutes afterwards. The two candidates who contested the constituency were then nominated in the presence of a large number of electors, including the petitioner, who made no protest. It did not appear that any injury had been caused thereby:—

Per BOYD, C.—The requirement was merely directory or regulative; non-compliance therewith might or not be fatal, and so avoid the election, according to circumstances; and as no one was prejudiced, it could have no fatal effect. In any event the petitioner, under the circumstances, was estopped from raising the objection; and *Semble*, he was also precluded from raising the objection by reason of, as it appeared, his claiming the seat for the defeated candidate, thus ratifying and adopting what was done at the election.

Per CAMERON, J.—The requirement was imperative, and non-compliance therewith avoided the election; and the petitioner was not estopped from raising the objection.

On appeal to the Court of Appeal, the judgment proceeded on another ground.

Per BURTON, J. A.—The point was now covered by sec. 48 of 47 Vic. ch. 4, (O.)

Per PATTERSON, J. A.—*Quære*, whether sec. 48 was intended to apply to this point, this being a matter specially dealt with by sec. 15 of R. S. O. 1877 ch. 10. *East Simcoe* (Provincial), 291.

See BALLOT, 1—SAVING CLAUSE, 2.

IRREGULARITIES IN VOTERS' LISTS.

See VOTERS' LISTS.

KNOWLEDGE.

Corrupt act committed without knowledge or consent of the candidate—R. S. O. 1877 ch. 10, sec. 161.]
—See REFRESHMENTS, 1.

See also AGENCY, 3.—ALIENS.

MAJORITY.

See SAVING CLAUSE, 1.

MASTER AND SERVANT.

See INTIMIDATION.

MEETINGS.

1. *R. S. O. 1877 ch. 10, sec. 151—“Meeting of electors”—Liberal association—Treating.*—An association formed “for the greater diffusion of liberal principles and the social and intellectual improvement of its members,” being prevented by an accident from meeting at the town hall, held a meeting in a tavern, and was treated by the respondent:—

Held, not a meeting of electors within sec. 151 of R. S. O. 1877 ch. 10. *North Ontario* (Provincial), 1.

2. *R. S. O. 1877 ch. 10, sec. 151—“Meeting of electors”—Treating.*—A meeting of some thirty-five or forty electors had assembled for the purpose of promoting the election. During the meeting an agent of the

respondent went into an adjoining room with four or five friends and treated and was treated by them:—

Held, by the Court of Appeal, not to be a furnishing of entertainment “to a meeting of electors assembled,” etc., under sec. 151, R. S. O. 1877 ch. 10.

Per OSLER, J.A.—The question must always be, whether the entertainment has been furnished to the general body of the electors composing such meeting, whether before, during, or after the business of the meeting, and while as a body such electors remain together at the place of meeting or elsewhere. *Prescott* (Provincial), 88.

3. *R. S. O. 1877 ch. 10, sec. 151—“Meeting of electors”—Treating by candidate after speaking over—Involuntary or excusable ignorance.*—It appeared that on February 15th the respondent was chosen by a convention of his party as their candidate. On February 23rd a public meeting was held by him in a room in a hotel, which meeting was composed of about sixteen persons, some belonging to the opposite political party. A chairman was appointed and the respondent addressed the meeting, as did others also. As soon as the proceedings closed, *i.e.*, when the speaking was over, nearly all present crossed the hall, and went into the barroom. The respondent followed, first inviting the few who remained to join them, and then in the barroom invited them to drink, which they did, he paying for the liquor. On February 27th the nomination took place and the polling on March 13th:—

Held (at the trial and by the Court of Appeal. GALT, J., dissenting), that this was a violation of R. S. O. 1877 ch. 10, sec. 151.

Per HAGARTY, C. J. O., and BURTON, J. A.—R. S. O. 1877 ch. 10, sec. 151, refers clearly to a meeting of electors, whether the formalities of appointing a chairman or secretary are observed or not ;

Held, also (GALT, J., dissenting) that, though the act of treating appeared to have been committed in ignorance that it was a violation of the statute, it did not appear to have been committed in an ignorance which was involuntary or excusable.

Per BURTON, J. A.—Under the present enactment in R. S. O. 1877 ch. 10, sec. 151, it need not be shewn that the meeting in question was assembled for promoting the election of the candidate furnishing the entertainment, but the meeting referred to is a meeting assembled for the purpose of promoting the election of a representative of the electoral district.

Per GALT, J.—Refreshment was not furnished to the meeting while it was assembled, and therefore there was no offence under R. S. O. 1877 ch. 10, sec. 151. The meeting was to all intents and purposes at an end, and moreover, even conceding the corrupt act, it was done in ignorance which was involuntary and excusable. *Muskoka and Parry Sound* (Provincial), 197.

4. R. S. O. 1877 ch. 10, sec. 151 —“*Meeting of electors*”—*Local committee meetings*—*Treating*.]—On different occasions a few members of one of the respondent's local committees met together at different taverns, to go over voters' lists and arrange as to doubtful votes, and on each occasion liquor was furnished to the committee men thus engaged, at the expense of different agents of the respondent :—

Held, *per* BOYD, C., that such com-

mittee meetings were not “meetings of electors,” within the meaning of sec. 151 of the Act ; *per* CAMERON, J., that sec. 151 was specially directed against the treating of such committee meetings.

On appeal :—

Held, by the Court of Appeal, PATTERSON, J. A., dissenting, that such meetings were within the meaning of the section. *East Middlesex* (Provincial), 250.

Party association for constituency—*Committee meetings*—*Membership*—*Authority*—*Recognition*—*Corrupt practices*.]—*See* AGENCY, 7.

See also AGENCY, 8—PLEADING, 3—TREATING, 2.

NOMINATION.

See IRREGULARITIES AT ELECTION.

NOTICE.

See AMENDMENT.

NOTICE OF MOTION.

Discretion to dispense with.]—*See* TRIAL OF PETITION, 3.

OATHS.

See FARMERS' SONS.

PARTICULARS.

See AMENDMENT—APPEAL, 2—PLEADING, 2, 3.

PARTNERSHIP.

See **HIRING VEHICLES**, 2.

PENAL STATUTE.

See **ALIENS**.

PERSONATION.

See **SAVING CLAUSE**, 4.

PETITION.

Unauthorized alteration in material part of election petition after filing—Alteration by clerks of agent of petitioner's solicitor — Spoliators — Not agents—Service in altered state—Ratification —Amendment.]— After an election petition had been filed, two clerks of the Toronto agents of the solicitor for the petitioner were allowed to compare it with an engrossed copy, and, finding that the two were different, they altered the filed petition so as to correspond with the copy, adding in one place the word "treating," which had the effect of introducing a charge of a corrupt practice not in the original. The copy served upon the respondent after this alteration corresponded with the petition as altered. It was not shewn and it was denied that the petitioner knew of the alteration:—

Held, that the addition of the word "treating" was an alteration in a material part; but that the clerks in doing what they did were not the agents of the petitioner or his solicitor. As the document was in the possession of the Court, such an alteration, made by persons who were mere strangers or spoliators,

had not the effect of destroying it. The service of the petition in its altered condition could not, in the absence of knowledge of the alteration, be treated as a ratification by the petitioner.

It was ordered that the petition should be restored to its original state, and that the copy served should be amended to conform with the petition as it was when filed. *Lincoln and Niagara* (Dominion), 428.

See **AMENDMENT—PLEADING**, 1, 2, 3—**SERVICE OF PETITION—TRIAL OF PETITION**, 1, 2, 3.

PLEADING.

1. *Allegation of corrupt practices —R. S. O. 1877 ch. 10, secs. 152, 153.]—*An allegation in the petition "that the respondent was by himself, etc., guilty of corrupt practices, as defined by the Controverted Elections' Act of Ontario," sufficiently charges the commission of corrupt practices under secs. 152 and 153 of "The Election Act," R. S. O. 1877 ch. 10. *North Ontario* (Provincial), 1.

2. *Form of petition—Charge included in particulars but not in petition—Charge of corrupt practice under R. S. O. 1877 ch. 10, sec. 153—Giving refreshment to voters on polling-day — Affidavit accompanying petition—"Treating" does not cover corrupt practice under sec. 153 —No power to amend petition.]—* The petitioner in his particulars charged the respondent with giving or causing to be given meat, drink, and refreshment to voters on polling-day on account of their having voted or being about to vote, being a corrupt practice under R. S. O. 1877

ch. 10, sec. 153. The petition itself, however, merely charged that the respondent "before, during, at, and after the said election, was by his agents and other persons on his behalf guilty of corrupt practices as defined by the Controverted Elections' Act of Ontario," R. S. O. 1877 ch. 11, sec. 2 :—

Held (at the trial), that this form of petition was objectionable, being hardly reconcilable with the intention of the legislature in requiring petitioners to file an affidavit with the petition stating that they have reason to believe and do believe the statements contained in the petition to be true in substance and in fact, and, moreover, the charge being only by reference to a statute, the affidavit in such case could only be intelligently and honestly made by one who had informed himself of the provisions of the statute and applied to them some definite construction, and in any event the deponent would only be swearing to his own construction of the statute, without stating what that construction was :—

Held, further, that inasmuch as "corrupt practices," so far as defined at all by R. S. O. 1877 ch. 11, were declared to mean "bribery, treating, and undue influence, or any of such offences, as defined by this or any other Act of the legislature, or recognized by the common law of the Parliament of England," and also the violation of certain specific sections of R. S. O. 1877 ch. 10, among which sec. 153 was not included, and, inasmuch as acts prohibited by sec. 153 were clearly not corrupt practices under the common law of Parliament, nor is there any definition of "treating" in any of the Acts of our legislature, and therefore nothing to shew that it covers

offences under sec. 153, and therefore, inasmuch as there might be extended upon the face of the petition every offence covered by the description or definition of corrupt practices contained in the Controverted Elections' Act of Ontario, and yet there would not be amongst them any charge under sec. 153; *therefore*, the petitioner could not succeed in avoiding the election upon any charge under sec. 153, as he sought to do here, unless allowed to add it by way of amendment to his petition. On the cross-appeal of the petitioner on this point no judgment was given, the disposition of the respondent's appeal rendering it unnecessary to do so.

Held, further at the trial, that such amendment could not be allowed, for R. S. O. 1877 ch. 11, sec. 9, sufficiently shews that the Court has no jurisdiction to allow such an amendment, notwithstanding sec. 2, sub-sec. 1, and sec. 43, of that Act, as does also the requirement of an affidavit under sec. 11.

Maude v. Lowley, L. R. 9 C. P. 165, followed. *Re Election for the Electoral Division of the County of Monck*, H. E. C. 154, 32 U. C. R. 147, distinguished. *West Simcoe* (Provincial), 128.

3. *Allegation of treating—Admissibility of particulars and evidence shewing furnishing liquor to meetings.*—*Held*, at the trial, *per* BOYD, C., and CAMERON, J., that particulars and evidence shewing the furnishing of liquor to meetings of committees were admissible under the general allegation of the petition that the respondent by himself and his agents had been guilty of "treating." *East Middlesex* (Provincial), 250.

POLITICAL ASSOCIATIONS.

Non-existence of political association in constituency—Absence of organization of party supporting candidate—Evidence of agency—Activity—Recognition—Attendance at committee meeting—Scrutineer.—*See* AGENCY, 10.

Deputy returning-officers—Recommendations.—*See* DEPUTY RETURNING-OFFICERS.

R. S. O. 1877 ch. 10, sec. 151—“Meeting of electors”—Treating.—*See* MEETINGS, 1.

See also AGENCY, 7.

QUALIFICATION OF VOTERS.

R. S. O. 1877 ch. 10, secs. 153, 154—Hiring vehicles—Voters or non-voters.—*See* HIRING VEHICLES, 1.

See also FARMERS' SONS—UNORGANIZED TOWNSHIPS.

RAILWAY PASSES.

See TRAVELLING EXPENSES, 2.

RATIFICATION.

See PETITION.

REFRESHMENTS.

1. *Giving refreshment to voters on polling-day—Corrupt act—Election void—R. S. O. 1877 ch. 10, sec. 158—Saving clause, sec. 159—Absence of knowledge on part of respondent—Sec. 161.*—It appeared in the evidence that at the place of polling the respondent's firm had a house in

connection with their mills, where their workmen were boarded, and where the respondent himself had rooms. A short time before the election. Mrs. B., who had formerly been housekeeper of the said house, had become tenant of it, or was allowed to occupy it, and have the use of the furniture, and was paid a certain sum per week or month for each man boarding there, and a sum per day for casual boarders, and she was in this position at the time of the election. On polling-day, H., a nephew and partner of the respondent, who spent the day at the polling-place, told voters that if they went to the said boarding-house they could warm themselves and would find dinner if they wished it, and meat and drink were accordingly caused to be given to the voters at the boarding-house by H., who was clearly the respondent's agent throughout:—

Held (at the trial), that the voters having come to the place for the purpose of voting, and that being their errand there, and the election being the occasion on which the provision was made and the hospitality extended to them, the act in question was done on account of each man so entertained “having voted or being about to vote,” and inasmuch as it was impossible to say that the result may not have been affected by the above offer of hospitality (R. S. O. 1877 ch. 10, sec. 159), the election would have been void by reason thereof under sec. 158, had the matter been properly charged in the petition. (*See* PLEADING, 2).

Held, however, that the evidence did not shew that the corrupt act was committed with the actual knowledge and consent of the respondent, and therefore he had not

incurred the penal consequences of R. S. O. 1877 ch. 10, sec. 161. *West Simcoe* (Provincial), 128.

2. *Giving drink to voters on polling-day—No discrimination as to politics.*]—S., being an agent of the respondent, on the election day brought some whiskey to a blacksmith shop near a poll, being a place where the neighbours were in the habit of congregating to warm themselves, etc., there being no tavern or public-house in the neighbourhood, and treated those who were present (most of them being voters) without reference to their voting, and without distinction as to which side they supported:—

Held, not a corrupt practice. *Lennox* (Provincial), 41.

3. *R. S. O. 1877 ch. 10, sec. 157—Violation of during polling hours by agent—Corrupt practice.*]—Section 157 of R. S. O. 1877 ch. 10 forbids the selling or giving of liquor at any time during the polling-day, under a penalty of fine or imprisonment, and the same Act provides that any violation of that section during the hours appointed for polling is a corrupt practice.

Held (at the trial), that a violation of the section during the polling hours by an agent of the candidate must be conclusively presumed to have been intended corruptly to influence the election. *Prescott* (Provincial), 88.

4. *Offer of refreshment—R. S. O. 1887 ch. 9, sec. 155—Valuable consideration—Sec. 151, sub-sec. (a).*]—Two agents of the respondent went for a voter, having a flask of brandy in their conveyance. The voter, having said he was unwell, was asked if he would have a drink,

which the trial Judges held, meant a drink from the flask, and which he declined:—

Held, that this offer did not fall within the provisions of sec. 155, R. S. O. 1887 ch. 9, as there was no "giving or causing to be given":—

Held, also, that it did not come within sec. 151, sub-sec. (a), a drink not being a valuable consideration. *Hamilton* (Provincial), 499.

See PLEADING, 2—TREATING, 1, 2, 3.

REJECTED BALLOT PAPERS.

See BALLOT, 2.

REPORT OF TRIAL JUDGES.

Separate reports—Joint certificate—R. S. O. 1877 ch. 11, sec. 65—Estoppel.]—See DISQUALIFICATION OF CANDIDATE, 2.

RETURNS.

Return of personal expenses by candidate.]—See SAVING CLAUSE, 4.

SAVING CLAUSE.

1. *R. S. O. 1877 ch. 10, sec. 159—Single corrupt act—Majority.*]—*Held*, under all the circumstances of the case, there being only a single corrupt act proved, that the case was a proper one for the application of R. S. O. 1877 ch. 10, sec. 159, though the majority was only twenty; and that the election should not be avoided. *North Ontario* (Provincial), 1.

2. *R. S. O. 1877 ch. 10, sec. 159*—*Illegal practices—Irregularities—of deputy returning-officer at poll.*]—Where there had been certain irregularities at a polling-place in the manner of marking the ballot-papers of illiterate voters:—

Held, that the irregularities could not, by themselves, be said to have affected the election; but

Quære, whether in conjunction with a corrupt act found to have been committed by an agent of the candidate, they could under *R. S. O. 1877 ch. 10 sec. 159*, conjointly, be said to have done so:—

Held, (at the trial) that the irregularities in question were not “illegal practices” as mentioned in that section, but were rather defaults than acts or practices, and entirely unconnected with corrupt practices. What is referred to in *sec. 159* is systematic illegality, whether amounting to corruption or falling short of it, to such an extent that the particular acts which are proved may be reasonably considered merely to be instances in connection with the general system of corruption or illegality which has been prevalent during the contest. *Prescott* (Provincial), 88.

3. *R. S. O. 1877 ch. 10, sec. 159*—*Selling liquor on polling-day contrary to R. S. O. 1877 ch. 10, sec. 157—Not of trifling nature or extent—Election declared void under sec. 158—“Trifling” construction of—Majority—Scrutiny—Power of saving election to be cautiously exercised, especially by appellate Court.*]—Where an agent of the respondent sold or gave drink at his tavern on polling-day:—

Held, that this corrupt act was not shewn to be of such trifling nature and extent as to come within

R. S. O. 1877 ch. 10, sec. 159; and the election was declared void under *sec. 158*.

Per PATTERSON, J. A., and FERGUSON, J., that the object and purpose of *R. S. O. 1877 ch. 10, sec. 159*, do not require anything in the shape of an attempt to estimate the number of votes which can be shewn or surmised to have been affected by the corrupt act in question, and to balance that against the actual majority. Although, no doubt, the word “trifling” must be construed in each case with some reference to the majority, particularly when considering the extent of the corrupt acts, the Court is not called upon to enter into a *quasi* scrutiny for the purposes of this section.

Per SPRAGGE, C. J. O. — The power of saving an election under *R. S. O. 1877 ch. 10, sec. 159*, should be exercised very cautiously, and *a fortiori* by the Judges of the appellate Court where the rota Judges have deemed the case to be not proper for the application of the power given by this section of the Act. *West Simcoe* (Provincial), 128.

4. *R. S. O. 1877 ch. 10, sec. 159*—*Corrupt practices—Bribery by agents—Personation—Candidate’s personal expenses—Return of—Treating by candidate—Absence of chief agent from trial.*]—D., an agent of the respondent, bribed M., a voter, by payment of money. The same D. gave one L., after he had voted, \$1, which both D. and L. said was a loan and not a gift:—

Held, as to the first payment, *per* BOYD, C., and CAMERON, J., a corrupt practice; as to the latter payment, *per* BOYD, C., not a corrupt practice, the evidence not connecting the payment with the vote given; *per* CAMERON, J., that it did.

H., a voter, was paid \$4 by an agent of the respondent for one day's work posting bills :—

Held, per BOYD, C., not a corrupt practice ; *per* CAMERON, J., an unreasonably large payment for the work done, though not sufficient, if it were the only charge, to avoid the election.

Two cases of personation were established, but no agent of the respondent was a party to either :—

Held, per BOYD, C., that but one corrupt practice was proved, and that, in view of the provisions of sec. 159 of R. S. O. 1877 ch. 10, that one was not sufficient to avoid the return.

Held, also per BOYD, C., that inasmuch as the respondent's personal expenses had not amounted to \$100, and as, during the canvass, although he had treated friends, he had not done so to any greater extent than had previously been his habit, neither his personal conduct during the election, nor the absence from the trial of one of his chief agents, against whom considerable suspicion was raised by the evidence, ought to prevent the Court from applying the provisions of sec. 159 to the circumstances of this case.

Held, per CAMERON, J., that though nothing corrupt or unusual was proved as to the respondent's expenses or treating, he had not properly returned his personal expenses, and this circumstance, coupled with the keeping out of the way at the time of the trial of one of his chief agents, should prevent the respondent receiving the benefit of section 159 of the Act, and the election should be avoided.

On appeal :—

Held, OSLER, J. A., dissenting, that upon the evidence the election was saved under the provisions of

section 159. *East Middlesex (Provincial)*, 250.

5. R. S. O. 1877 ch. 10, sec. 159—*Bribery—Corrupt acts.*]—H. was a prominent supporter and agent of the respondent, secretary of the reform association of the riding, delegate to the convention which nominated the respondent, and an active organizer and manager of the election contest. R., a voter, well known to H., as what he called a "loose fish," and belonging to a family reputed to sell their votes, came to H., and asked for money for his vote ; not succeeding, he returned next day and made a similar request. Finally he asked for \$5, because, he said, he was sick and hard up, and wanted to pay his taxes. Whereupon H. gave him \$5, but on R. pledging his word that it had nothing to do with his vote. R. told T., another voter, that if he wanted \$4 or \$5 now was his time, and introduced him to H. T. asked if any money was going, and offered his own vote for \$10, and those of his father and three brothers for \$20. H. gave him \$4, calling it a loan, and on T.'s word of honour that it would not influence him in the election. H. also hired the team of a man named C. for the election day. The election was very close, over 2,700 votes being polled, and the respondent's majority about twenty-three :—

Held, that these were clearly corrupt acts ; but *per* BOYD, C., they did not avoid the election, as they came within the protection of R. S. O. 1877 ch. 10, sec. 159 ; and *per* CAMERON, J., that they did avoid the election, as they were not within the said protection.

Per BOYD, C.—The scope of the section was that an election should not be set aside for two or three

illegal acts of a trifling nature or extent, where the majority is considerably more than the votes affected, unless these illegal acts and practices prevailed, and were so influential, extensive, and insidious as to induce the probable and reasonable belief that but for such acts and practices the result might have been different, while here, after striking off the corrupt votes, the respondent would still have a majority.

Per CAMERON, J.—The extent of the influence of the corrupt acts is not to be measured or estimated merely by the number of corrupt votes, but in connection with the influence of the party proved to be guilty of its commission, and by the opportunities he may have had of resorting to like practices in other cases.

On appeal to the Court of Appeal:—

Held, affirming the finding of CAMERON, J., (BURTON, J. A., dissenting,) that the corrupt acts did not come within the protection of sec. 159; and therefore the election was avoided. *East Simcoe* (Provincial), 291.

6. *R. S. O. 1877 ch. 10, sec 159*—*Corrupt practices—Payment by agent of voter's travelling expenses—Corrupt practices and illegal acts by non-agents—Corrupt act in connection with illegal practices—Trifling nature and extent of—“Result” meaning of—“Other illegal practices at the election,” meaning of.*—At the trial of the petition one corrupt act, namely, the payment of the travelling expenses of a voter M. by F., an agent of the respondent, was proved; it was also found that C. D. was guilty of bribery, in giving a dollar to each of two voters and offering money to another, but no

agency was proved, and that L. B. gave liquor at his tavern during polling hours, but he was not proved to be an agent. It was contended that these latter acts, and the evidence as to the acts and conduct of three other parties in connection with other charges, which were not proved, should all be taken into consideration with the proved corrupt act, in order to take the case out of sec. 159 of the Election Act, R. S. O. 1877 ch. 10, and prevent the respondent from saving his seat under the provisions of that section:—

Held, that the election was not avoided:—

Per PATTERSON, J. A.—The “result” referred to in sec. 159 is the result which touches the right to the seat which is being contested, *i.e.*, the majority of legal and honest votes. The petitioner could not insist on giving evidence of any corrupt practice which he has not charged—and for this purpose illegal acts are corrupt practices—but whether the evidence given upon any charge is sufficient to establish it, or falls short of doing so, any facts or any course of conduct shewn by that evidence may be properly considered in connection with any other corrupt or illegal practice which has been proved, and the nature or probable extent of which it may serve to elucidate; but on consideration of all the facts in this case, this election should be held good and the respondent duly elected.

Per FERGUSON, J.—The words “other illegal practices at the election,” at the end of sec. 159, must be illegal practices the existence of which is ascertained and known, and the way their existence becomes known is by the evidence. This cannot rest in conjecture, it must be

proved. Whenever, in giving evidence to prove a corrupt practice charged as having been committed by an agent, it appears that illegal practices took place, though the evidence fail to prove the agency, these illegal practices are comprehended in the meaning of the words "other illegal practices at the election," and must be taken in connection with the corrupt act of the agent. On the whole case, the corrupt act proved was so trifling that the result cannot have been affected by it, either alone or in connection with the other illegal practices at the election; and the election should not be avoided. *Welland* (Provincial), 383.

7. *R. S. O. 1877 ch. 10, sec. 159* — *Bribery — Illegal practices — Scheme for violating secrecy of ballot — Suspicious circumstances — Sec. 146.*]—R. (an agent) committed two clearly proved acts of bribery; F. D. and W. D. (agents) entered into a scheme for violating the secrecy of the election by inducing voters to exhibit their ballots, after they were marked, at a window; and the evidence developed at least two other acts of bribery, though not by agents, and some suspicious circumstances; but all these were without the knowledge or consent of the respondent. The vote polled was about 4,500, out of which there was a majority of fifty-one for the respondent:—

Held, that the election was void because of the corrupt acts of R.; and in view of the conduct and details of the contest, the saving provisions of sec. 159 of the Election Act, *R. S. O. 1877 ch. 10*, could not be applied.

Per Curiam.—The scheme for violating the secrecy of the ballot was an illegal act under sec. 146, and

had no little significance when taken in connection with the proved acts of bribery. In estimating the application of sec. 159 it was impossible to leave out of sight the illegal practices under sec. 146.

The West Simcoe Case, 1 E.C. 153, referred to and followed. *East Northumberland* (Provincial), 434.

8. *R. S. O. 1887 ch. 9, sec. 163*—*Corrupt practices—Illegal practices* — "*Such trifling nature*," — "*Such trifling extent*."—*Held*, as to the acts of two paid agents in voting, that had they stood alone, not being part of any comprehensive scheme, the Court would have hesitated before deciding that they did not fall within section 163, in which case the election would not have been avoided; but, following the *East Simcoe Case*, 1 E. C. 291, that inducing a number of aliens to vote was an overt act, part of an arranged system of operations, and was such a corrupt practice as could not be considered of "*such trifling nature*," or "*such trifling extent*," that the result could not be supposed to be affected by it. Had the corrupt practice indicated not been sufficient of itself to avoid the election, the two other corrupt practices proved, together with certain other illegal practices committed by a person not an agent of the respondent, the evidence as to which was uncontradicted, would have sufficed. *Hamilton* (Provincial), 499.

R. S. O. 1877 ch. 10, sec. 162.]—*See DISQUALIFICATION OF CANDIDATE*, 1, 2, 3.

R. S. O. 1877 ch. 10, sec. 159.]—*See REFRESHMENTS*, 1.

SCRUTINEERS.

Illegal acts at polling place—
Agency.]—See AGENCY, 9.

*Candidate answerable for illegal
acts at polling place of his scrutineer.]*
—See FARMERS' SONS.

See also AGENCY, 10.

SCRUTINY.

See FARMERS' SONS—TENDERED
BALLOT.

SECRECY OF BALLOT.

*Scheme for violating secrecy of
ballot.]—See SAVING CLAUSE, 7.*

See also BALLOT, 1, 2—IRREGU-
LARITIES AT ELECTION.

SERVICE OF PETITION.

*Order for substitutional service—
When to be made—Service on wife
of respondent at his domicile.]—*
There is no power in the Court or a
Judge under sec. 10 of the Dominion
Controverted Elections' Act, R. S. C.
ch. 9, to make an order within the
first five days after an election peti-
tion is filed allowing service of such
petition in any manner other than
that intended by the final part of the
section.

But where under an order made
within the five days a petition was
directed to be served, among other
modes, upon the wife of the respon-
dant at his domicile at the village of
D. :—

Held, that, as service on the re-
spondent "either personally or at
his domicile," was good service, with-

in the meaning of the section, no
order was necessary, and the fact that
the service in this case was made
under an order did not make it any
the less a good service. *Haldimand*
(Dominion), 480.

See PETITION.

SOLICITOR'S CLERKS.

See PETITION.

STATUTES.

R. S. C. ch. 8, secs. 41, 45, 90, 91, 93.]
—See FARMERS' SONS.

R. S. C. ch. 8, secs. 84 (a), 88.]—See
TRAVELLING EXPENSES, 3.

R. S. C. ch. 8, secs. 88, 91.]—See
HIRING VEHICLES, 2.

R. S. C. ch. 9, sec. 10.]—See SERVICE
OF PETITION.

R. S. C. ch. 9, secs. 32, 33.]—See TRIAL
OF PETITION, 1.

R. S. C. ch. 9, sec. 33, sub-sec. 2.]—
See TRIAL OF PETITION, 2.

R. S. C. ch. 9, sec. 71.]—See BALLOT, 2.

R. S. O. 1877 ch. 10, sec. 15.]—See
IRREGULARITIES AT ELECTION.

R. S. O. 1877 ch. 10, sec. 33.]—See
IRREGULARITIES AT ELECTION.

R. S. O. 1877 ch. 10, sec. 146.]—See
SAVING CLAUSE, 7.

R. S. O. 1877 ch. 10, sec. 147.]—See
IRREGULARITIES AT ELECTION.

R. S. O. 1877 ch. 10, sec. 149 (a).]—
See BRIBERY, 4.

R. S. O. 1877 ch. 10, sec. 151.]—See
MEETINGS, 1, 2, 3, 4.

R. S. O. 1877 ch. 10, sec. 152.]—See
PLEADING, 1.

R. S. O. 1877 ch. 10, sec. 153.]—*See* HIRING VEHICLES, 1—PLEADING, 1, 2—TRAVELLING EXPENSES, 1.

R. S. O. 1877 ch. 10, sec. 154.]—*See* AGENCY, 5—DISQUALIFICATION OF CANDIDATE, 1, 2—HIRING VEHICLES, 1—TRAVELLING EXPENSES, 1, 2.

R. S. O. 1877 ch. 10, sec. 157.]—*See* AGENCY, 4—REFRESHMENTS, 3—SAVING CLAUSE, 3.

R. S. O. 1877 ch. 10, sec. 158.]—*See* AGENCY, 4—REFRESHMENTS, 1—SAVING CLAUSE, 3.

R. S. O. 1877 ch. 10, sec. 159.]—*See* AGENCY, 4—COSTS, 1, 2—REFRESHMENTS, 1—SAVING CLAUSE, 1, 2, 3, 4, 5, 6, 7.

R. S. O. 1877 ch. 10, sec. 161.]—*See* DISQUALIFICATION OF CANDIDATE, 1, 2, 3—REFRESHMENTS, 1.

R. S. O. 1877 ch. 10, sec. 162.]—*See* DISQUALIFICATION OF CANDIDATE, 1, 2, 3.

R. S. O. 1877 ch. 10, secs. 174, 175.]—*See* APPEAL, 4.

R. S. O. 1877 ch. 10, sec. 197.]—*See* IRREGULARITIES AT ELECTION.

R. S. O. 1877 ch. 11, sec. 2.]—*See* PLEADING, 2.

R. S. O. 1877 ch. 11, sec. 2, sub-sec. 6; sec. 38.]—*See* DISQUALIFICATION OF CANDIDATE, 1, 2.

R. S. O. 1877 ch. 11, sec. 9.]—*See* PLEADING, 2.

R. S. O. 1877 ch. 11, sec. 43.]—*See* PLEADING, 2.

R. S. O. 1877 ch. 11, secs. 63 *et seq.*]—*See* APPEAL, 4.

R. S. O. 1877 ch. 11, sec. 65.]—*See* DISQUALIFICATION OF CANDIDATE, 2.

47 Vic. ch. 4, sec. 48 (O.).]—*See* DISQUALIFICATION OF CANDIDATE, 1, 2—IRREGULARITIES AT ELECTION.

R. S. O. 1887 ch. 9, secs. 72, 103.]—*See* TENDERED BALLOT.

R. S. O. 1887 ch. 9, sec. 151 (a).]—*See* REFRESHMENTS, 4.

R. S. O. 1887 ch. 9, sec. 155.]—*See* REFRESHMENTS, 4.

R. S. O. 1887 ch. 9, sec. 160.]—*See* ALIENS.

R. S. O. 1887 ch. 9, sec. 163.]—*See* SAVING CLAUSE, 8.

52 Vic. ch. 3, secs. 5, 17 (O.).]—*See* VOTERS' LISTS.

TENDERED BALLOT.

Right of voters whose names are omitted from list to vote by R. S. O. 1887 ch. 9, secs. 72, 103 - Scrutiny.]—*Held*, that voters whose names were accidentally omitted from the voters' list were entitled to vote by "tenderd ballot," and their votes should be counted on a scrutiny.

Semble, that the effect of sections 72 and 103 of the "Ontario Elections Act," R. S. O. 1887 ch. 9, is that where a person who has a right to vote is omitted from the list he may vote by tendered ballot. *East Durham* (Provincial), 489.

TIME.

R. S. C. ch. 9, secs. 32, 33, construction of—Time for trial of petition—Extending time.]—*See* TRIAL OF PETITION, 1.

TRAVELLING EXPENSES.

1. *R. S. O. 1877 ch. 10, secs. 153, 154—Driving and entertaining voter—Hiring vehicles.*]—*S.*, an agent of the respondent, with his own conveyance brought a voter from N. to his own house, where he remained as a guest until after the polling day :—

Held, not within either sec. 153 or 154 of R. S. O. 1877 ch. 10. *North Ontario* (Provincial), 1.

2. *R. S. O. 1877 ch. 10, sec. 154* — *Railway passes* — *Corrupt practices*.]—The obtaining by an agent of a candidate from the president of a railway company six passes, for which nothing had been or was ever intended to be paid, three of which were used in bringing as many voters to the poll is not a corrupt practice within the meaning of R. S. O. 1877 ch. 10. sec. 154.

The mischievous effects that might arise from such a practice on the part of railway companies remarked upon. *South Victoria* (Provincial), 182.

3. *Corrupt practice—Inducing to vote by loan or gift of money—Enabling to vote—Payment of travelling expenses—R. S. C. ch. 8, sec. 84, sub-sec. (a)—Ib., sec. 88*.]—Where the agent of a candidate asked a voter if he intended to vote, and the voter said he did not think so, as he could not spare the money to go, but that if he went he would not vote for the opposing candidate, and the agent thereupon lent him the cost of a return ticket; and the evidence shewed that the transaction was a *bonâ fide* loan and not a gift, and was not made with the intention of influencing the vote in favour of the principal, and that the money was repaid shortly after the election without any demand made therefor:—

Held, that the above did not constitute a corrupt practice under R. S. C. ch. 8, sec. 84, sub-sec. (a), or sec. 88.

The voter had the will to go and vote, and to vote for the agent's principal, but he had not the means to enable him to do so, and these were

furnished to him by the agent, but as a *bonâ fide* loan, not as a gift. Thus he was not induced but merely enabled to vote by a temporary loan, and no breach of the law contained in the above sections was committed. *East Elgin* (Dominion), 475.

4. *Promise of money for expenses to induce voter to go away and thus refrain from voting—Subsequent payment by brother of promisor—Absence of voter on polling day—Corrupt practice*.]—An election petition charged that H., an agent of the candidate whose election was attacked, corruptly offered and paid \$5 to induce a voter to refrain from voting. The evidence shewed that H. was in the habit of assisting this particular voter, and that being told by the voter that he contemplated going away from home on a visit a few days before the election, and being away on election day, H. promised him \$5 towards paying his expenses. Shortly after the voter went to the house of H. to borrow a coat for his journey, and H.'s brother gave him \$5. He went away and was absent on election day:—

Held, that the offer and payment of the \$5 formed one transaction and constituted a corrupt practice under the Election Act. *Haldimand* (Dominion), 572.

See DISQUALIFICATION OF CANDIDATE, 1, 2—SAVING CLAUSE, 6.

TREATING.

1. *Treating voter before he votes*.]—On the morning of the polling day, S. met McN. in a hotel, and asked him to vote for the respondent, to which he agreed; he then took him to his (S.'s) house, and

afterwards to a tavern where he treated him, and then to the poll where he voted :—

Held, a corrupt act. *North Ontario* (Provincial), 1.

2. *Candidate treating on same evening as meeting held—Habit of treating.*]—The respondent, during his canvass and on the same evening that a public meeting was held for the purpose of promoting the election, treated a number of persons, many of whom were voters, collected in a barroom. It was shewn that it was not the respondent's general habit to treat, that all present were invited to drink, and that he had not treated more than twice or perhaps three times during the canvass :—

Held, not a corrupt practice, and that in view of the ordinary custom of treating in the country, it might be regarded more as an expression of good feeling to those who were supporting him. *North Ontario* (Provincial), 1.

3. *Motive for treating.*]—An agent of the respondent treated a voter by giving him a glass of whiskey. According to the voter's account, it was nothing more than an act of good fellowship; while, according to the agent's account, the voter was not feeling well, and the whiskey was given in consequence :—

Held, not a corrupt act so as to avoid the election. *West Northumberland* (Dominion), 32.

(Reversed in Supreme Court of Canada.)

See MEETINGS, 1, 2, 3, 4—PLEADING, 2, 3—REFRESHMENTS, 1, 2, 3, 4—SAVING CLAUSE, 4.

TRIAL JUDGES.

See APPEAL, 1, 2, 3—BALLOT, 2—DISAGREEMENT OF TRIAL JUDGES—DISQUALIFICATION OF CANDIDATE, 1, 2.

TRIAL OF PETITION.

1. "*Dominion Controverted Elections' Act*," R. S. C. ch. 9, secs. 32, 33, construction of—*Time for trial of petition—Extending time.*]—The petition was presented on the 6th May, 1887, during a session of Parliament which ended on 23rd June, and issue was joined on 3rd June; no application was made or steps taken after that until the 6th December, 1887, when the petitioner applied to have a time and place appointed for trial and to have the time for the commencement of the trial enlarged.

The first part of sec. 32 of the Controverted Elections' Act, R. S. C. ch. 9, is as follows :

"The trial of each election petition shall be commenced within six months from the time when such petition has been presented and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the Court or Judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included :"—

Held, PATTERSON, J. A., dissenting, that the exception in the last clause is confined to a case in which the Court is satisfied that the re-

spondent's presence is necessary ; "such trial" refers to a trial at which the respondent's presence has been declared to be necessary ; and no such declaration having been made in this case, the time of the session of Parliament was not to be excluded from the six months within which the trial was to be commenced.

It was not incumbent upon the respondent to move to dismiss the petition for default.

The Court could not *nunc pro tunc* declare that the respondent's presence at the trial was necessary.

Per Curiam, that the time for the commencement of the trial may be enlarged under section 33, notwithstanding the expiration of the six months ; but it had not been established in this case that the requirements of justice rendered such enlargement necessary ; and the Court refused to appoint a time and place for trial or to enlarge the time. *Algoma* (Dominion), 448.

2. *R. S. C. ch. 9, sec. 33, sub-sec. 2*—*Trial during sittings of Divisional Court.*—*Semble*, that *R. S. C. ch. 9, sec. 33, sub-sec. 2*, does not prevent a Judge proceeding with the trial of an election petition pending the sitting of the Divisional Court of which he is a member. *West Middlesex* (Dominion), 465.

3. *Order fixing time for trial—Jurisdiction to make—Court or Judge—Notice of motion—Discretion to dispense with.*—*Held*, that an order fixing the time for the trial of the petition might be made by the three Judges of a Divisional Court, sitting together, or by any one of them sitting alone, and that it was in their discretion to dispense with notice of

the application under the circumstances in this case.

Semble, a Judge making such an order need not necessarily be sitting formally in single Court. *Haldimand* (Dominion), 480.

UNORGANIZED TOWNSHIPS.

Voting in unorganized townships—Place of voting—Qualification of voters—Householders.—*Held*, by PATTERSON, J. A., and FERGUSON, J., that, (1) a person, the owner of real estate of the value of \$200 or upwards, anywhere within the electoral district, has the right to vote at any polling place in the unorganized township in the electoral district where he may happen to be on polling day ; (2) that where the real estate on which such person relies as his qualification to vote is situate in one of the unorganized townships his right is to vote in any of the unorganized townships without being restricted to the township where his property may be situate ; (3) that to entitle a person to vote in the unorganized townships on the qualification of householder, he must be a householder—that is to say, have his qualification as such—with in the limits of the unorganized township. *Muskoka and Parry Sound* (Provincial), 197.

VALUABLE CONSIDERATION.

See REFRESHMENTS, 4.

VEHICLES.

See HIRING VEHICLES.

VOLUNTEER.

See AGENCY, 1, 3.

VOTERS.

See ALIENS—BALLOT, 1 — UN-
ORGANIZED TOWNSHIPS.

VOTERS' LISTS.

Irregularities in certified copy of list—Right of omitted voters to vote—“Ontario Voters' Lists Act, 1889,” secs. 5 and 17.]—Any one of the three voters' lists regularly prepared, and certified to by the County Court Judge under the Voters' Lists Act, “is the proper list to be used,” and in case of irregularity in, loss or destruction of, or other accident to, the other or others, may be resorted to for the purpose of the election.

Where all the requisite preliminaries in the preparation of voters' lists under the Act had been duly observed, but in one of the printed copies delivered to the County Judge, and certified to by him, two pages

containing voters' names were accidentally omitted, and this defective copy was sent by the Judge to the clerk of the peace, who from such copy certified to the returning-officer similarly defective lists, which were used at the election:—

Held, that the voters whose names were so omitted were not disfranchised. *East Durham* (Provincial), 489.

WORDS.

“*Event.*”]—See COSTS, 1, 2, 4, 5.

“*Illegal practices.*”]—See SAVING CLAUSE, 2.

“*Meeting of electors.*”] — See MEETINGS, 1, 2, 3, 4.

“*Other illegal practices at the election.*”]—See SAVING CLAUSE, 6.

“*Result.*”]—See SAVING CLAUSE, 6.

“*Treating.*”]—See PLEADING, 2.

“*Trifling nature — trifling extent.*”]—See SAVING CLAUSE, 3, 5, 6, 8.

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